Supreme Court, U.S.
FILED
06-510 OCT 9 - 2006
OFFICE OF THE CLERK

No. ____

In the

Supreme Court of the United States

HILLSBORO PROPERTIES, and
PAUL GOLDSTONE ENTERPRISES, INC.
dba RANCHO GRANDE MOBILEHOME PARK,

Petitioners,

v.

CITY OF ROHNERT PARK, a
municipal corporation, and
CITY OF ROHNERT PARK RENT APPEALS BOARD,

Respondents.

On Petition for Writ of Certiorari to California Court of Appeal for First Appellate District, Division Three

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Nineteen years ago, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, this Court required all States to provide a remedy of just compensation for regulatory takings. Since that time, the appellate courts of the State of California have not upheld a single award of compensation for a taking not involving a physical invasion or occupation of property, and in the decision below the California court carved out one category of takings for which *no remedy at all* is available under state law.

For seven years the City of Rohnert Park enforced an unconstitutional rent control law that extinguished Hillsboro's vested property right to collect lawfully noticed rents from the tenants of its mobile home park. After the law was struck down, Hillsboro sued to recover its losses through either a mandatory prospective rent increase under the City's successor rent ordinance, or an award of just compensation against the City. In the decision below, the California Court of Appeal ruled that no remedy exists in that state for Hillsboro's constitutional injury.

This presents the following questions:

1. Under *First English*, when a property owner has obtained a judicial determination that a rent control law is unconstitutional, may the City that administers that law avoid paying just compensation for the temporary abdidgment of an owner's contractual right to collect lawfully noticed rents over the seven years in which the unconstitutional regulations were in effect?

2. Since Petitioners' regulatory takings claim is now ripe for federal adjudication, but Petitioners are barred from litigating their claim in federal district court by this Court's recent decision in *San Remo Hotel v. City and County of SanFrancisco*, should this Court directly rule on Petitioners' regulatory takings claim as a matter of federal law?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Hillsboro Properties and Paul Goldstone Enterprises, Inc. (Hillsboro), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, First Appellate District, entered in the above-entitled proceeding on April 6, 2006.

OPINIONS BELOW

The decision of the California Court of Appeal, First Appellate District, is reported as *Hillsboro Properties v. City of Rohnert Park*,138 Cal. App. 4th 379, 41 Cal. Rptr. 3d 441 (2006), and is reproduced as Appendix (App.) A. The Order of the California Supreme Court denying Hillsboro's petition for review is unreported and is reproduced as Appendix C. The Order of the California Superior Court for the County of Sonoma is unreported and is rep50roduced as Appendix B.

JURISDICTION

The opinion of the California Court of Appeal which is the subject of this petition was filed and entered on April 6, 2006. App. A. The order of the California Supreme Court denying Hillsboro's petition for review was entered on July 12, 2006. App. C. This petition for writ of certiorari has been timely filed in accordance with Rule 13.1 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "[P]rivate property [shall not] be taken for public use, without just compensation."

The City of Rohnert Park's Mobile Home Ordinance, as codified at Chapter 9.7 of the Rohnert Park Municipal Code, is reproduced as Appendix F.

INTRODUCTION: A BRIEF GUIDE TO THE STATE AND FEDERAL DECISIONS WHOSE INTERACTION HAS LEFT CALIFORNIA PROPERTY OWNERS WITH NO REMEDY FOR THE CLASS OF REGULATORY TAKINGS INVOLVED IN THIS CASE

U. S. Supreme Court Cases

***Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985):**

For the first time, this Court held that plaintiffs who allege a violation of their Fifth Amendment rights under the Takings Clause must "ripen" their claim for adjudication in federal court by first seeking (and being denied) just compensation in state court—provided the state offers "a reasonable, certain and adequate provision for obtaining compensation." *Id.* at 194. *Williamson County* initially had no impact in California because compensation for a regulatory taking was expressly foreclosed in that state, as a matter of law. (*See Agins v. City of Tiburon*, below.)

***First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987):**

Two years after *Williamson County*, this Court determined in *First English* that "the self executing character" of the Takings Clause entitled regulatory takings plaintiffs to a remedy of just compensation in the courts of every state. *Id.* at 315. Unfortunately, *First English* provided no enforcement mechanism to ensure that the state courts would comply with this mandate. The only observable effect of *First English* in California has been to deprive plaintiffs of the option of pursuing their claims for just compensation in federal court. In the 19 years since *First English* was decided, no reported decision of the California state courts has awarded or upheld the award of just compensation for a taking not involving a physical invasion or occupation of property.

***San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2005):**

San Remo modified *Williamson County* by holding that, once a plaintiff has sought and been denied compensation in state court, a claim for violating the Fifth Amendment ordinarily cannot be brought in federal district court. Instead of "ripening" the federal takings claim, complying with *Williamson County* in fact extinguishes that claim. Thereafter, adjudication of the federal constitutional violation can be had only by way of certiorari to this Court.

California Cases

***Agins v. City of Tiburon*, 598 P.2d 25 (Cal. 1979):**

Reviewing a claim that a city's downzoning of property to prevent its development violated the Takings Clause the California Supreme Court enunciated that state's position on claims for just compensation: "[W]hile such governmental action is invalid because of its excess, remedy by way of damages in eminent domain is not thereby made available. . . . A landowner may not elect to sue in inverse condemnation and thereby

transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid." *Id.* at 28.

***Hensler v. City of Glendale*, 876 P.2d 1043 (Cal. 1994):**

In California's initial response to *First English*, *Hensler* required regulatory taking claimants to first obtain a due process remedy of *invalidation* of offending measures as a prerequisite to a claim for compensation under the Fifth Amendment. In effect, California's traditional *Agins* remedy of invalidation was retained, but coupled with the potential for just compensation following invalidation. Echoing its earlier language in *Agins*, the California Supreme Court reiterated: "A landowner may not, by seeking only compensation, force a governmental agency to condemn the property." *Id.* at 1047.

***Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851 (Cal. 1997):**

Kavanau built on *Hensler* by ruling that, in the context of rent control, the availability of the due process remedy of a prospective rent increase (a "*Kavanau* adjustment") foreclosed the possibility of a suit for just compensation for a regulatory taking. The state supreme court sought to reconcile its holding with this Court's *First English* mandate by effectively equating the remedies of invalidation and just compensation: "[A] remedy for the due process violation, if available and adequate, is a ***valuable benefit*** that satisfies the takings clause." *Id.* at 865 (emphasis added).

***Galland v. City of Clovis*, 16 P.3d 130 (Cal. 2001):**

Galland extended the "*Kavanau* adjustment" as the state's exclusive remedy for any violation of a property owners civil rights under 42 U.S.C. § 1983, by operation of a rent control statute. *Id.* at 134.

***Hillsboro Properties v. City of Rohnert Park*, 138 Cal. App. 4th 379, 41 Cal. Rptr. 3d 441 (2006):**

In the case at bar, the California Court of Appeal ruled that a "*Kavanau* adjustment"—the sole remedy available in that state for violations of the Takings or Due Process Clauses by operation of a rent control statute – was available ***only*** in cases wherein the property owner had been denied a "fair return" on his property. 138 Cal. App. 4th at 392; 41 Cal. Rptr. 3d at 451. Thus, for the entire class of takings represented by this case, in which vested property rights are extinguished by the application of an admittedly unconstitutional rent regulation, the California courts now offer no remedy whatsoever.

STATEMENT OF THE CASE

In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, this Court required every state to provide a remedy of just compensation for violations of the Takings Clause of the Fifth Amendment. Coupled with the Court's prior ruling in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, this had the effect of foreclosing access to federal courts for most takings claims against state and local governments—even in California, which as a matter of state law had never recognized a compensation remedy for regulatory takings. *See Agins v. City of Tiburon*, 598 P.2d 25.

This case highlights the dilemma these conflicting doctrines have created for victims of regulatory takings in California, who cannot obtain just compensation under the state courts' *de facto* retention of the *Agins* doctrine, but are barred from litigating their claims in federal court by *Williamson County*.

Hillsboro owns and operates the Rancho Grande Mobile Home Park in the City of Rohnert Park, California (City). In 1987, the City adopted Mobile Home Ordinance 494, which imposed rent control on spaces in mobile home parks. App. A-5. Hillsboro promptly challenged the facial constitutionality of

Ordinance 494, and ultimately obtained a judgment that the ordinance was unconstitutional from the time of its inception until it was replaced by a new rent control measure, Ordinance 599, in 1995. App. A-5 – A-6.

Throughout the seven-year period in which the City illegally restricted rents by means of its unconstitutional Ordinance 494, Hillsboro lawfully noticed annual rent increases to the tenants of Rancho Grande that exceeded the increases permitted under the City's rent regulations. The park's tenants were notified that these rent increases would be implemented if the City's restrictions were found to be illegal. Under California law, a property owner acquires a legal right to collect noticed rents if the tenant chooses to remain in occupancy after receipt of such notice. Calif. Civ. Code § 827. Nevertheless, the rents Hillsboro actually collected over this time were limited to the levels specified by Ordinance 494. Thus, by the time Ordinance 494 was struck down, Hillsboro had accumulated contractual rights to the difference between its noticed rents and the lesser amounts the City had allowed it to collect, over a seven-year period. These rights had been abrogated by the City's *ultra vires* enforcement of illegal regulations, thereby imposing a substantial economic injury on Hillsboro.

When Hillsboro succeeded in having Ordinance 494 struck down as unconstitutional "from its inception," Joint Appendix on Appeal [JA] 283-84, it could have filed a Fifth Amendment takings claim in federal court, asking just compensation from the City in the amount of the contractual rents Hillsboro had been illegally forced to forgo under Ordinance 494. However, *Williamson County* barred such an action until Hillsboro had attempted to recover its losses through California state procedures. Under California law, the only remedy for damages inflicted by the application of rent control ordinances is a "*Kavanau* adjustment," increasing prospective rents by an amount sufficient to offset the damages. *See Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851; *Galland v. City of Clovis*, 16 P.3d 130. Accordingly, from August of 2003

through August of 2004, Hillsboro sought to apply to the Rent Appeals Board for a *Kavanau* adjustment under Ordinance 599. JA 50-138. Throughout this time, the City refused even to allow Hillsboro's application to come before the board. JA 18.

Finally, after a definitive statement from the City's attorney that no *Kavanau* adjustment was available under the City's regulations, JA 142, Hillsboro filed suit in California Superior Court, seeking either the *Kavanau* adjustment to which it was entitled under state law, or just compensation from the City as required by the Fifth Amendment. JA 1. The trial court sustained the City's demurrer on the grounds, *inter alia*, that Hillsboro did not allege that the operation of Ordinance 494 had deprived it of a "fair return"[1] on Rancho Grande.

The question of whether Hillsboro was entitled to just compensation under the Fifth Amendment was argued and decided in the California Court of Appeal. *See* App. A-3 – A-4. In affirming the trial court's dismissal, the appellate panel did not dispute that Hillsboro had suffered significant economic injury because of the City's violation of Hillsboro's civil rights. However, the court determined that, since Hillsboro did not allege the denial of a "fair return" on its property (which was not an element of its injury), Hillsboro could not state a claim for relief for the City's taking of its contractual rights:

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[1] The term "fair return" is set out in quotes because it is a term of art occurring in rent control ordinances, but with no fixed meaning. *See, e.g.*, Michael St. John, *Fair Return and the California Courts* 45-66 (1995) (setting out six different methods that have been accepted as defining a "fair return" all of which arrive at different results). The concept is even more nebulous in the present case, since the City had no lawful rent ordinance in effect from 1988 through 1995 that could have set out the legal parameters for calculating either a "fair" or "unfair" return on Hillsboro's property. In any event, Hillsboro's complaint did not go to the fairness, reasonableness, or adequacy of the rents it was allowed to collect under Oridnance No. 494, but to the fact that the City was without legal authority to regulate rent levels at all.

> Hillsboro's failure to allege that the [unconstitutional] Rohnert Park ordinance deprived it of a fair rate of return on its investment . . . defeats ***any possible right to recovery***.

App. A-15 (emphasis added). The California Supreme Court denied Hillsboro's petition for discretionary review. App. C.

Under *Williamson County*, the state court's determination that California provides no remedy for the taking of Hillsboro's contractual rights supposedly "ripened" Hillsboro's regulatory taking claim for federal adjudication. *See Williamson County*, 473 U.S. at 194-97. While Hillsboro's state lawsuit was pending, however, this Court handed down its decision in *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323. Under *San Remo*, federal adjudication of Hillsboro's right to just compensation under the Fifth Amendment cannot be had from the district courts, but only by way of certiorari to this Court.

Hillsboro now petitions this Court to recognize that the state courts of California are in willful noncompliance with the mandate of *First English*, and to order the court below to devise a remedy of just compensation that meets the minimum standards of constitutionality as set forth in *First English*. Alternatively, this Court should recognize that the decision below has ripened Hillsboro's takings claim for federal adjudication under *Williamson County*—but since access to the lower federal courts is barred by *San Remo*, as an alternative to remanding and ordering the California Court of Appeal to award just compensation to Hillsboro, this Court should rule on Hillsboro's takings claim directly, as a matter of federal law.

REASONS FOR GRANTING THE WRIT

I

UNDER THIS COURT'S *FIRST ENGLISH* DECISION, THE CALIFORNIA COURTS MAY NOT CARVE OUT A SPECIAL CATEGORY OF REGULATORY TAKINGS FOR WHICH NO REMEDY AT ALL WILL BE PROVIDED

Prior to 1987, the California courts offered declaratory, injunctive, and writ relief for as-applied regulatory takings. *See Agins v. City of Tiburon*, 598 P.2d at 30-31. That State's highest court, however, expressly foreclosed an inverse condemnation remedy—i.e., just compensation—for any kind of regulatory taking:

> [A] landowner alleging that a zoning ordinance has deprived him of substantially all use of his land may attempt through declaratory relief or mandamus to invalidate the ordinance as excessive regulation in violation of the Fifth Amendment to the United States Constitution and article I, section 19, of the California Constitution. He may not, however, elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid.

Id. at 28.

This Court directly confronted and overruled *Agins* in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304. Rejecting California's policy of limiting the remedy for regulatory takings to equitable relief, the *First English* Court stated:

> [G]overnment action that works a taking of property rights necessarily implicates the constitutional obligation to pay just compensation.

Id. at 315. Accordingly, the California doctrine espoused in *Agins* was overruled as "inconsistent[] with the requirements of the Fifth Amendment." *Id.* at 311.

This Court, other courts, and commentators have interpreted *First English* to mean that all states now must—*and in fact, do*—provide a just compensation remedy for regulatory takings. *See, e.g.*, Kenneth R. Kupchak, Gregory W. Kugle & Robert H. Thomas, *Arrow of Time: Vested Rights, Zoning Estoppel, and Development Agreements in Hawai'i*, 27 U. Haw. L. Rev. 17, 32 n.86 (2004) (citing courts which "hold that *First English* requires a state to provide a compensation remedy, even if it has not explicitly done so"); J. David Breemer, *Overcoming Williamson County's Troubling State Procedures Rule: How the England Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. Land Use & Envtl. L. 209, 246 n.203 (2003) (*First English* "requires that state courts recognize a compensation remedy for a federal takings violation"). *See also* Transcript of Oral Argument, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 1998 WL 721087, at *30 (emphasis added):

> **Justice Ginsburg:** [A]s a result of our two decisions, *Williamson* [and *First English*], there won't be any ripe claim to be brought in the Federal court as a court of first view any more, because the inverse condemnation proceeding will take place – ***must take place*** in the California State courts, is that right?
>
> **Mr. Berger:** That's my reading of this Court's cases as well, Justice Ginsburg.

However, as this Court previously learned with *Brown v. Board of Education*, 347 U.S. 483 (1954), it is one thing to instruct the state courts on the requirements of the Constitution, but it can be quite another matter to obtain compliance with those instructions. To this day, no published decision of the California state courts has ever awarded or upheld an award of just compensation for a taking that did not entail a governmental invasion or occupation of private property.

Regulatory takings claims arising from the application of rent control laws were relegated to a special category of non-compensability by the California Supreme Court in *Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851. In *Kavanau*, the state's highest tribunal determined that the *due process* remedy of a hearing before the local rent board was "a valuable benefit" that satisfied the Just Compensation Clause—and, by necessary implication, satisfied *First English*:

> [A] remedy for [a] due process violation, if available and adequate, *obviates a finding of a taking*.

Id. at 865 (emphasis added).

Every regulatory takings claimant is required, under California's unique procedural scheme, to obtain a due process remedy as a prerequisite to pursuing inverse condemnation. *See Hensler v. City of Glendale*, 876 P.2d at 1051-52 (requiring successful invalidation action via mandamus or declaratory relief as a procedural prerequisite to inverse condemnation). By declaring in *Kavanau* that a due process remedy "obviates" the finding of a regulatory taking—and therefore moots any inverse condemnation claim—the California Supreme Court has effectively foreclosed inverse condemnation as a remedy in all cases involving the abrogation of property rights by operation of rent control ordinances. Notwithstanding this Court's pronouncement in *First English* overruling California's 1979 *Agins* doctrine, the *Kavanau* decision effectively re-implemented *Agins* in the context of rent control. The state's exclusive remedy of a "*Kavanau* adjustment"—i.e., a compensatory

increase in future rents sufficient to offset past damages—was subsequently extended to all rent-control-related claims brought under 42 U.S.C. § 1983, not just those for regulatory takings. *See Galland v. City of Clovis*, 16 P.3d at 134 .

Thus, when Hillsboro obtained a judgment that the City's enforcement of Ordinance 494 had been unconstitutional from its inception, it faced a dilemma. *Williamson County* required Hillsboro to seek compensation through *state procedures* for the seven years of illegally depressed rents it had suffered because of the City's unconstitutional actions. 473 U.S. at 194-97. If Hillsboro had filed a claim for compensation directly in federal court, the action would promptly have been dismissed as unripe. *See, e.g., Carson Harbor Village v. City of Carson*, 353 F.3d 824 (9th Cir. 2004) (dismissing regulatory takings claim for failure to seek compensation through California state procedures); *Hotel & Motel Association of Oakland v. City of Oakland*, 344 F.3d 959 (9th Cir. 2003) (same); *Moreno v. City of Sacramento*, 101 Fed. Appx. 656, 2004 WL 1166530 (C.A.9 (Cal.) 2004) (same). Yet the only remedy California's procedures made available, under *Kavanau* and *Galland*, was a prospective rent adjustment from the City's rent board, now operating legally under an amended ordinance. Faced with the certainty of dismissal in federal court, Hillsboro had no choice but to submit its claim to the City for the pseudo-remedy of a "*Kavanau* adjustment." App. A-6.

When the City refused to process Hillsboro's application for a prospective rent increase it became obvious that the state's remedy of a "*Kavanau* adjustment" provides not even spurious relief to claimants like Hillsboro, whose right to collect freely agreed-upon rents over a seven-year period was simply extinguished by the City's *ultra vires* enforcement of an unconstitutional rent ordinance. The decision below, establishing that *Kavanau* adjustments are not available to takings claimants who do not allege the loss of a "fair return" on their rental property as an element of the offense, carves out a

special category of regulatory takings for which the California courts offer *no remedy at all.*

Thus, in the 19 years since *First English* was handed down, the California judiciary has retreated from offering the "constitutionally inadequate" remedy of equitable relief for regulatory takings, to offering no remedy whatsoever. The holding of the court below makes a mockery of *First English's* mandate of just compensation for all takings, and highlights the state's failure to implement this Court's decision. Just as follow-up action was required by this Court to impress upon the states the need to comply with *Brown* (*see Green v. County School Board*, 391 U.S. 430 (1968); *Cooper v. Aaron*, 358 U.S. 1 (1958)), similar action is now required to bring California into compliance with *First English.* This Court should grant certiorari and order the California court to devise a just compensation remedy in this case that comports with the requirements of *First English.*

II

UNDER *WILLIAMSON COUNTY* AND *SAN REMO*, THE CALIFORNIA COURT'S DETERMINATION THAT NO REMEDY FOR HILLSBORO'S INJURY IS AVAILABLE IN THAT STATE AUTOMATICALLY RIPENS HILLSBORO'S CLAIM FOR ADJUDICATION IN FEDERAL COURT—BUT ONLY BY *THIS* COURT

In *Williamson County*, this Court set out two requirements to "ripen" a regulatory takings claim for adjudication in federal court. The second of these requirements—the only one relevant to the case at bar—is that a Fifth Amendment takings plaintiff must have sought and been denied "compensation through the procedures the State has provided for doing so." 473 U.S. at 194.

The proceedings below amply fulfill *Williamson County's* "state procedures" requirement for ripening Hillsboro's taking claim. Not only did the court of appeal deny any compensation for the City's extinguishment of Hillsboro's vested right to receive the rents for which it had contracted; the court established that, as a matter of law, California provides *no remedy of any kind* for regulatory takings of the sort Hillsboro has suffered. App. A-15. Under *Williamson County*, because "no constitutional violation occurs until just compensation has been denied," 473 U.S. at 194, n.13, Hillsboro's regulatory taking claim became ripe for federal court adjudication when the opinion below was filed.

Until this Court's 2005 decision in *San Remo*, most analysts understood that Hillsboro could have filed a Fifth Amendment claim for just compensation in federal district court immediately upon California's confirmation that the taking Hillsboro suffered was one without compensation. That is, the California court confirmed the existence of the factual predicates for setting out a constitutional violation, and Hillsboro could seek a remedy for that violation in federal court. *See, e.g.*, J. David Breemer, *Overcoming Williamson County's Troubling State Procedures Rule: How the England Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. Land Use & Envtl. L. 209, 246-51 (2003); Stephen E. Abraham, *Williamson County Fifteen Years Later When Is a Takings Claim (Ever) Ripe?*, 36 Real Prop. Prob. & Tr. J. 101, 112-15 (2001); Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in its Effort to Formulate Coherent Regulatory Takings Law?*, 30 Urb. Law. 307, 355-56 (1998).

Under *San Remo*, however, the lower federal courts are without jurisdiction to hear a claim for just compensation once the plaintiff has complied with *Williamson County's* mandate to confirm that an uncompensated taking has occurred. *San Remo*, 125 S. Ct. at 2501-02. Once state procedures have been utilized

to confirm that an alleged taking is one without compensation, and therefore violative of the Fifth Amendment's Just Compensation Clause, ***only this Court*** has the authority to order the offending agency to provide just compensation, in compliance with the Fifth Amendment and *First English*. *See id.* at 2499 (suggesting that the *San Remo* plaintiffs should have sought compensation by way of a writ of certiorari to this Court from the California Supreme Court, instead of submitting their claim to the federal district court).

Hillsboro therefore respectfully prays for this Court to grant the petition for certiorari and issue an order requiring the City of Rohnert Park to provide just compensation for the injuries Hillsboro has suffered from the City's *ultra vires* enforcement of an unconstitutional ordinance, in an amount to be determined at trial.

CONCLUSION

For all the reasons set forth above, the petition for writ of certiorari should be granted.

DATED: October, 2006.

Respectfully submitted,

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Filed 4/6/06

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

HILLSBORO PROPERTIES et al.)
)
Plaintiffs and Appellants,)
)
v.)
)
CITY OF ROHNERT PARK et al.)
)
Defendants and Respondents.)
)

A110441

(Sonoma County
Super. Ct. No. SCV-235529)

A property owner is prevented from charging increased rent by a rent control ordinance that is subsequently determined to be unconstitutional. Is the owner entitled to recover the lost rental income, either from its tenants or from the city that imposed the limit, if the ordinance did not deny the owner a fair return on its investment? We hold that it is not.

Appendix A–2

In 1987, the City of Rohnert Park (the city) passed a rent control ordinance that limited the amount by which a landlord of a mobile home park could raise rents. Plaintiffs Hillsboro Properties and Goldstone Enterprises, Inc., doing business as Rancho Grande Mobilehome Park (collectively, Hillsboro) seeks to recover, either from its tenants or from the city, rents in excess of the rent control ceiling for the period during which the ordinance, subsequently held to be unconstitutional, was in force. Hillsboro relies principally on *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761 (*Kavanau*) in arguing that it is entitled to recover additional rents from its tenants, and on *Galland v. City of Clovis* (2001) 24 Cal.4th 1003 (*Galland*) in seeking to recover directly from the city. In *Kavanau*, the court held that when a rent control law becomes confiscatory—i.e., denies the property owner a fair rate of return—a constitutional taking can be obviated by allowing the landlord to adjust future rents to compensate for prior enforcement of the overreaching law. From 1988 through 1995, Hillsboro gave notice to its tenants of higher rents that it sought to impose, but could not because of the ordinance. In 1995, the city amended the ordinance to allow a landlord to raise rents above the rent control ceiling in order to recoup the cost of capital improvements, which the original measure did not permit. In 1996, a federal court determined that the ordinance as originally written was unconstitutional because it did not provide a fair return on capital improvements. In December 2002, the federal court held that the amended ordinance satisfied constitutional requirements. Beginning in August 2003, Hillsboro unsuccessfully attempted to apply to the rent board for a "*Kavanau* adjustment," but the city attorney refused to submit the application to the board. In September 2004, Hillsboro filed suit in the superior court for, among other things, inverse condemnation; a declaration that the ordinance had effected an unconstitutional taking; and a writ of mandate ordering the rent board to consider the application. The trial

court sustained the city's demurrer to the complaint without leave to amend and this appeal followed.

BACKGROUND

Legal framework

There are two provisions in both the state and federal Constitutions that protect owners of private property from overly restrictive governmental regulation. "The due process clauses of the state and federal Constitutions guarantee property owners 'due process of law' when the state 'deprive[s] [them] of. . . property.' (Cal. Const., art. I, §§ 7, 15; U.S. Const., 14th Amend., § 1.) . . . [T]he takings clauses . . . guarantee property owners 'just compensation' when their property is 'taken for public use.' (Cal. Const., art. I, § 19; U.S. Const., 5th Amend.)" (*Kavanau, supra*, 16 Cal.4th at p. 770.) These provisions "prohibit government from depriving a person of property without due process of law. [Citations.] These provisions guarantee appropriate procedural protections [citation] and also place some substantive limitations on legislative measures [citations]. The latter guaranty-sometimes described as substantive due process-prevents government from enacting legislation that is 'arbitrary' or 'discriminatory' or lacks 'a reasonable relation to a proper legislative purpose.' [Citation.] [¶] In the context of price control, which includes rent control, courts generally find that a regulation bears' a reasonable relation to a proper legislative purpose' so long as the law does not deprive investors of a 'fair return' and thereby become 'confiscatory'." (*Id.* at p. 771.)

Government regulation may effect a taking of property if it "goes too far." (*Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393, 415.) Such a regulatory taking entitles the property owner to "bring an inverse condemnation action, and if it prevails, the regulatory agency must either withdraw the regulation or pay just compensation. [Citation.] Even if the agency withdraws

the regulation, the property owner may have a right to just compensation for the temporary taking while the regulation was in effect." (*Kavanau, supra*, 16 Cal.4th at p. 773.)

In Kavanau the Supreme Court examined a rent control ordinance enacted by the City of Santa Monica. That ordinance limited rent increases to no more than 12 percent in a given year. (*Kavanau, supra*, 16 Cal.4th at p. 770.) In a preceding action, the Court of Appeal held that the 12 percent limit violated Kavanau's right to due process, and Kavanau obtained a writ of mandate prohibiting the city from applying the limit to his property. (*Id.* at pp. 767, 777.) That holding was not challenged and Kavanau then brought a second action seeking damages from the city. (*Id.* at p. 779.) The Supreme Court found that Kavanau had failed to state a cause of action for inverse condemnation because there was no physical invasion of his property, and the regulation had not deprived him of substantially" 'all economically beneficial or productive use of his property." (*Id.* at p. 780, quoting *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015.) The court rejected Kavanau's argument that "because he lost rental income as a direct result of the Rent Board's unconstitutional application of its 12 percent limit, he has suffered a taking requiring just compensation." (*Kavanau, supra*, 16 Cal.4th at p. 781.) The court explained that Kavanau had a remedy available to him—an application to the rent board for a future increase in rents to cover the rental income lost while the unconstitutional provision was in effect—and therefore had not suffered a violation of his right to obtain a fair return on the value of his property. (*Id.* at pp. 782-783.) "[T]his remedy, as opposed to an award of damages against the Rent Board, places the cost of compensating Kavanau roughly on those tenants who benefited from unconstitutionally low rents." (*Id.* at p. 784.) The court concluded that a landowner could not state a cause of action for inverse condemnation if the owner could be compensated for the losses "flowing from the due process

violation through an adjustment of future rents under the rent regulation process." (*Id.* at p. 767.)

In *Galland, supra*, 24 Cal.4th 1003, the Supreme Court considered whether a landlord could recover damages against a government agency under 42 United States Code section 1983 for imposition of a confiscatorily low rent ceiling. It concluded that "a *Kavanau* adjustment would preclude section 1983 damages if it is adequate to prevent constitutional injury by compensating for previous excessively low rent ceilings." (*Galland, supra*, at p. 1008.) The court stated, however, that "unreasonable costs, in the form of administrative and attorney fees, imposed on landlords seeking rent increases, may themselves be the basis of a section 1983 claim . . . if either of two conditions is present: (1) the costs imposed are part of a government effort to deliberately flout established law, e.g., deliberately obstruct legitimate rent increases; or (2) the landlord suffers confiscation as a result of the imposition of such costs." (*Id.* at p. 1009.)

Factual background

Hillsboro's complaint, filed September 24, 2004, alleges as follows. In 1987, the city adopted Ordinance 494, "which established rent control for mobile home parks including Rancho Grande Mobilehome Park," which is owned by Hillsboro. Hillsboro believed the ordinance to be invalid "but did not collect annual rent increases over and above those authorized by Ordinance 494. In 1988, Hillsboro noticed a $15 rent increase over and above the rents allowed by the Ordinance." Hillsboro notified tenants that it would not seek to enforce the additional rent unless authorized to do so by a court or by the city. It notified tenants in their monthly bills "of the running total of noticed rent uncollected." The ordinance was amended on January 24, 1995. In 1996, a federal court entered judgment in Hillsboro's favor, ruling that the ordinance as

originally drafted violated the Fourteenth Amendment to the United States Constitution because it did not provide a method for a landlord to collect a return on capital improvements. The city continued to enforce the ordinance while it appealed that decision. On July 7, 1997, the Ninth Circuit Court of Appeals held that the city's appeal was moot because the ordinance had been amended. On July 18, 2000, Hillsboro filed a second action in federal court seeking a declaration that the city was wrongfully enforcing the ordinance, to which the city responded that the 1995 amendments cured any constitutional defects in the ordinance. In December 2002, the federal court held that the 1995 amendments had corrected the constitutional defect in the ordinance and entered judgment in the city's favor.

The present complaint alleges that on August 15, 2003, "Hillsboro filed with the City of Rohnert Park an 'Application for a rent increase to compensate it for the City of Rohnert Park's unlawful 1988 rent roll back and the enforcement of unlawful rent control rents from January 16, 1988 through January 24, 1995.' The application sought a rent increase for the city's unlawfully imposed rent levels from 1988 through January 1995."

The correspondence between counsel for Hillsboro and the city attorney for Rohnert Park that preceded the litigation is incorporated as attachments to the complaint. On September 2, 2003, the city attorney wrote to Hillsboro, stating that the city had received Hillsboro's "application for a rent increase to compensate it for the City of Rohnert Park's unlawful 1988 rent roll back and the enforcement of unlawful rent control rents from January 16, 1988 through January 24, 1995." The city attorney stated that "the application will not be referred to the Mobile Home Rent Review Board . . . since the board has no jurisdiction to hear such an application. . . ." The letter set forth five reasons why the city attorney asserted the rent board did

not have jurisdiction. First, the governing regulations "contemplate only two types of petitions for rent increases: (1) Petition for NOI [net operating income][1] increase when annual adjustment 'does not provide a landlord with a fair and reasonable return. . .'; and (2) capital improvement pass-through. . . .',[2] Second, a request for a *Kavanau* adjustment is premature because "there has not been a determination by a court that, during a specific period of time, the city's mobile home rent review rent control system either effected an unconstitutional taking of private property or a violation of Section 1983 (42 V.S.C. § 1983). There has been no determination by any court that during the period 1988-1995, the operation of the city's mobile home rent review ordinance was confiscatory, as related to the (a) formulation of the 1988 roll back; (b) the operation of the annual general adjustment; or (c) the operation of any part of the ordinance other than its omission of a capital improvement pass through." Third,

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[1] An "NO! increase" refers to a net operating income increase, which is intended to compensate a landlord "when an annual adjustment does not provide a landlord with a fair and reasonable return." Net operating income is defined under the Rohnert Park Rent Board regulations as "gross income minus operating expenses." (City of Rohnert Park, Rent Appeals Bd. Rules and Regs. For ch. 9.70 Mobile Home Ord. § 5.01, subd. (E)(1).)

[2] The relevant ordinances provide that "A rent adjustment shall be approved in order to provide a just and reasonable return and maintain net operating income in accordance with" listed criteria; and that a rental adjustment is allowed for capital improvements according to rules and regulations established by the rental appeals board "defining a capital improvement, determining the amortization period allowed for the recovery of the capital improvement, determining a reasonable rate of return on the capital improvement, determining the impact of a capital improvement on rent once the cost of the capital improvement has been fully recovered, and any other factor or criteria relevant to such determinations." (Rohnert Park Mun. Code, § 9.70.060, 9.70.062.)

Hillsboro "waived its claim for damages at the conclusion of the" federal litigation. Fourth, the city attorney disagreed that the federal court "voided" the ordinance. Finally, the city attorney made an additional argument interpreting the federal court's decision and argued that it had not, in fact, found the ordinance to be "void."

In the following year, Hillsboro and the city attorney exchanged correspondence in which Hillsboro continued to insist that it was entitled to a prospective rent increase under *Kavanau* without having to show that it was entitled to either an NOI adjustment or a capital improvement pass-through, and the city attorney steadfastly refused to forward the request for a rent increase to the rent board, citing the reasons listed above.

On September 24, 2004, Hillsboro filed its complaint, alleging a cause of action for inverse condemnation and seeking declaratory and injunctive relief and damages. The complaint sought a writ of mandate directing the rent board to consider its application. The city demurred to the complaint and the trial court sustained the demurrer without leave to amend, ruling that "Each of plaintiffs' claims are precluded by applicable statute of limitations. Plaintiffs claims are either precluded by the five-year statute of limitations for takings claims (*Travis v. County of Santa Cruz* (2004) 33 Ca1.4th 757) or the three-year statute of limitations for a challenge to an ordinance set out in Code of Civil Procedure section 338(a). [¶] Moreover, plaintiffs have not alleged any valid causes of action for a court-awarded '*Kavanau* increase.' The prerequisites for '*Kavanau*' damages are a formal adjudication that an ordinance deprived a property owner of a 'fair return.' [Citation.] That allegation has not been made-nor can plaintiff make this allegation because plaintiff has not exhausted all of its administrative remedies."

DISCUSSION

"When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations. (*Blank v. Kirwan* (1985) 39 Cal.3d 311.) Courts must also consider judicially noticed matters. (*Ibid.*) In addition, we give the complaint a reasonable interpretation, and read it in context. (*Ibid.*) If the trial court has sustained the demurrer, we determine whether the complaint states facts sufficient to state a cause of action." (*Schifanda v. City of Los Angeles* (2003) 31 Cal.4th 1074,1081.)

Statute of limitations

The city argues, and the trial court held, that Hillsboro's complaint is barred by the statute of limitations. "'A demurrer based on a statute of limitations will not lie where the action may be, but is not necessarily, barred. [Citation.] In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows that the action may be barred.'" (*Guardian North Bay, Inc. v. Superior Court* (2001) 94 Cal.App.4th 963,971-972.) The city reasons that the complaint is a challenge to the facial constitutionality of the ordinance and as such had to be brought within five years from the date that the ordinance was passed. (See *Hensler v. City of Glendale* (1994) 8 Cal.4th 1,24 [five-year statute of limitations for regulatory takings challenges].) Certain of Hillsboro' s causes of action unquestionably are facial attacks on the validity of the ordinance and are thus untimely. Others defy precise characterization.

The first four causes of action allege explicitly that as written the original ordinance is unconstitutional. These causes of action are thus barred. (*Hensler v. City of Glendale, supra*,

8 Cal.4th at p. 24.)[3] The fifth "cause of action," while couched in language that suggests it is a challenge to the ordinance as it was applied to Hillsboro, seeks a declaration that the ordinance "as amended provides no provision for payment of damages" and that the ordinance "as amended [is] invalid due to its failure to provide a remedy for damages." The sixth cause of action alleges inverse condemnation, and requests "just compensation for the taking of [Hillsboro's] property." The seventh cause of action alleges that the city has violated Hillsboro's right to due process and seeks a declaration "that by the city's deliberate non-actions and deliberate obstructions it has flouted the law in a deliberate manner and interfered with Hillsboro's property rights and rights entitling Hillsboro to an award of damages against the city." The eighth, ninth, and tenth causes of action purport to seek a writ of mandate in which the court will either "set the *Kavanau* rent increase according to proof," command the city "to formulate an adequate *Kavanau* adjustment remedy," or command the city "to perform its duty to hold a hearing upon Hillsboro's *Kavanau* application."

When these latter claims accrued is subject to question. If they are construed as facial challenges to the amended ordinance, the action accrued when the ordinance was amended in January 1995. In that case they are untimely. (*Hensler v. City of Glendale, supra*, 8 Cal.4th at p. 24.) On the other hand, the damage alleged by Hillsboro is that it was denied the ability to charge increased rents from 1988 through 1995. While that alleged damage occurred during those years, an action seeking

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[3] Although not raised by the parties or the trial court, we note that Hillsboro's claims are also barred to the extent that they challenge the constitutionality of the superceded ordinance. A party has "no legally cognizable interest in the constitutional validity of an obsolete statute. . . . [Such] challenges. . . are clearly moot.'" (*Citizens for Responsible Government v. Davidson* (10th Cir. 2000) 236 F.3d 1174. 1182.)

relief from a regulatory taking cannot be brought until the responsible administrative body has denied relief to the property owner. [A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." (*Williamson Planning Comm'n v. Hamilton Bank* (1985) 473 U.S. 172, 186.) "[U]ntil there has been a 'final, definitive position regarding' how the regulations will be applied to the land, a court cannot determine whether a compensable taking has occurred." (*Hensler v. City of Glendale, supra*, at p. 10.) Therefore, Hillsboro' s claim for inverse condemnation may not have accrued until the city definitively rejected its attempt to obtain a *Kavanau* adjustment. We need not resolve the limitations issue, however, since the trial court correctly concluded that Hillsboro has not made the allegations necessary to support any form of relief. (See, e.g., *Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 962 (*Santa Monica Beach*) ["we leave aside for the moment the problem of determining precisely when SMB's inverse condemnation claim accrued"].)

Taking and due process

Despite the numerous causes of action that Hillsboro has pleaded, and the many subsidiary disputes between the parties concerning the proper role of the city attorney and concerning the procedures by which Hillsboro has pursued its claim, the crux of the dispute in this case comes down to a single issue: Is Hillsboro entitled to recover rental income (either from its tenants or from the city) that it was precluded from charging by a constitutionally defective rent control ordinance if it was not thereby deprived of a fair rate of return on its investment? Hillsboro's position is that its substantive due process rights were violated because it was denied additional rental income by

application to it of "an unconstitutional, void, inoperative, and unenforceable law." "What is sought here," it explains, "is a means of recovering the damages incurred by Hillsboro when the city prohibited it from collecting its lawful, noticed rents. No determination of whether Hillsboro was denied a 'fair return' is necessary or proper to adjudicate that claim."

Hillsboro's position is based on a faulty premise. One is not denied substantive due process simply because one is affected by the application of a governmental promulgation that for some reason is found to be constitutionally defective. A denial of due process giving rise to a claim for relief arises only if application of the defective measure deprives one of a constitutionally protected right. (E.g., *Los Angeles v. Heller* (1986) 475 U.S. 796, 799 [even if regulation authorized use of constitutionally excessive force, no cause of action under 42 U.S.C. § 1983 absent constitutional injury arising from actual use of such force]; *Carey v. Piphus* (1978) 435 U.S. 247, 253-254 [recovery of substantial damages under 42 U.S.C. 9 1983 requires proof not only of violation of constitutional right but that plaintiffs injury was caused by deprivation of constitutional right]; *Utah Animal Rights Coalition v. Salt Lake City Corp.* (10th Cir. 2004) 371 F.3d 1248, 1260-1261 [demonstrators not entitled to damages for delay in issuing permit even though ordinance governing issuance of permits was later declared to be unconstitutional]; *Diesel v. Town of Lewisboro* (2d Cir. 2000) 232 F.3d 92, 103-104 [no "cognizable constitutional injury" from denial of preferential police treatment, even if selective enforcement of law was based on constitutionally impermissible consideration]; *Reyes v. City of Lynchberg* (4th Cir. 2002) 300 F.3d 449,455-457 [no per se cause of action under 42 U.S.C. § 1983 for prosecution under ordinance later held to be unconstitutional]; *Richardson v. City of South Euclid* (6th Cir. 1990) 904 F.2d 1050, 1053-1055, cert. denied 498 U.S. 1032 (1991) [same].)

The constitutionally protected right that is involved in this case, as in *Kavanau*, is the right to receive a fair rate of return on one's property. Government regulation that deprives a property owner of a fair return violates the substantive due process rights of the owner and may constitute a taking which requires the payment of just compensation. (*Galland, supra*, 24 Cal.4th at p. 1024; *Santa Monica Beach, supra*, 19 Cal.4th at p. 967; *Kavanau, supra*, 16 Cal.4th at pp. 776-777.) Hillsboro's argument proceeds on the unarticulated premise that a property owner has the constitutionally protected right to charge as much as it wants for the use of its property, so that enforcement of an invalid rent ceiling deprives it of a constitutionally protected right. That is not what the federal or state Constitutions, or *Kavanau, Galland* or any other case, protect.

"[O)rdinary rent control statutes are generally constitutionally permissible exercises of governmental authority." (*Santa Monica Beach, supra*, 19 Cal.4th at p, 962.) A constitutional injury does not occur simply because a government regulation limits the value of property, "A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project," but "[s]uch changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." (*Danforth v. United States* (1939) 308 U.S. 271, 285.) Nonetheless, "both the enactment and administration of rent control laws are subject to a number of constitutional constraints. Particular decisions of public agencies charged with administering rent control may be deemed to be unconstitutional if as a result landlords are deprived of a fair rate of return." (*Santa Monica Beach, supra*, at pp. 962-963.) A rent control measure is "confiscatory" and its enforcement constitutes a violation of the substantive due process rights of the owner if it deprives a property owner of a fair return. (*Id*, at p. 967; *Kavanau, supra*, 16 Cal.4th at pp,

771-773.) "Fair return is the constitutional measuring stick by which every rent control board decision is evaluated." (*Carson Harbor Village, Ltd. v. City of Carson Mobilehome Park Rental Review Bd.* (1999) 70 Cal.App.4th 281,288.)

Denial of a fair return is thus the sine qua non for relief under *Kavanau*. (See, e.g., *Santa Monica Beach, supra*, 19 Cal.4th at p. 963 [landlord "contend[ed] that the Rent Control Law. , . deprived it of a fair return on its property"]; *MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204,221 [rejecting mobile home park owner's assertion that maintenance of net operating income formula denied it a fair rate of return); *Morgan v. City of Chino* (2004) 115 Cal.App.4th 1192, 1200-1201 ["due process merely requires that the agency take capital improvements into account when evaluating whether the owner is receiving a fair return on the property as a whole. If the existing rents are sufficient to provide the owner with a fair return on the overall project even after the capital improvement, then due process is satisfied"]; *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644,679 [rent control regulation is facially invalid only if " 'its terms will not permit those who administer it to avoid confiscatory results in its application to the complaining parties' "].)

Hillsboro contends it is entitled to a "*Kavanau* adjustment" regardless of whether it has been denied a fair rate of return. The opinions in *Kavanau* and *Galland* support no such view. The decision in *Kavanau* was reached on the premise, established in prior litigation, that the particular rent control provision there had deprived the property owner of a fair return. As the Supreme Court later put it, the court "decided [in *Kavanau*] that under rent control, adjustment of future rents was generally sufficient to compensate for prior rent ceilings that were set *so low as to be confiscatory*, and that such adjustments precluded a claim for inverse condemnation." (*Galland, supra*, 24 Cal.4th at p. 1008, italics added.)

The remedy envisioned in *Kavanau* is permission to increase rents prospectively to achieve a reasonable rate of return for the period during which an unconstitutionally restrictive ceiling was in effect. On a showing that the landlord has been denied a reasonable return, the rent board must, if it is to avoid a taking, approve an appropriate rent increase to compensate the landlord at a fiscally reasonable level. This approach was extended in *Galland* to preclude the right to recover damages from a public entity when a *Kavanau* adjustment is available to remedy the prior imposition of confiscatory rent levels. When a *Kavanau* adjustment is inadequate, "landlords seek[ing] section 1983 damages from allegedly confiscatory rent regulation... must show," first, "that a confiscatory rent ceiling or other rent regulation was imposed." (*Galland*, supra, 24 Cal.4th at p. 1025.) And, to repeat, "rate regulation is confiscatory" only if it "does not allow a just and reasonable rate to investors." (*Santa Monica Beach, supra*, 19 Cal.4th at p.967.)

Hillsboro's failure to allege that the Rohnert Park ordinance deprived it of a fair rate of return on its investment thus defeats any possible right to recovery. If despite the invalidity of the ordinance the landlord received a fair return, there is no basis for a "*Kavanau* adjustment." The correspondence attached to the complaint indicates that Hillsboro persistently rejected the advice of the city attorney that in order to obtain a rental increase to compensate for rental income lost while the invalid measure was in effect, Hillsboro should apply for either an "NOI increase" or for an adjustment to provide a fair return on capital improvements. As indicated above, an "NOI increase" is available if gross income on the property less operating expenses does not provide a fair return. A capital improvement pass-through is available to provide a fair return on additional investments in the property. Implicit in the city's rejection of Hillsboro's application is the assumption that the amended Rohnert Park ordinance permits

upward rental adjustments in all circumstances in which a property owner potentially could be deprived of a fair rate of return. This assumption may be true by definition, but in all events we are unable to conceive of any circumstance in which an owner would not receive a fair return that does not come within the scope of the NOI increase or capital improvement provisions. We need not speculate as to whether there could be such a circumstance; it is sufficient to observe that the present complaint does not allege that any such circumstance exists here.

In the earlier federal action in which Hillsboro secured a judgment determining that the original Rohnert Park ordinance was unconstitutional, Hillsboro alleged that it "made capital improvements to its property." (*Hillsboro Properties v. City of Rohnert Park* (N.Dist.Cal., Mar. 29, 1996, No. 93 1723 FMS) 1996 WL 161738, p. *1.) The reason for which the federal court held the ordinance unconstitutional was "because it [did] not allow mobilehome parkowners to collect any profit on new capital improvements." (*Id.* at p. *3.) However, the court noted that "[a]s a result of [the subsequent] amendments to the Municipal Code, the tenants of [Hillsboro] and the city have entered into a voluntary stipulation allowing [Hillsboro] to pass through to the tenants in the form of a limited duration rent increase the cost of those capital improvements, together with a profit on those new investments in the park." (*Ibid.*) While we are not permitted to take judicial notice of the truth of these facts, we do consider that in its present pleading Hillsboro no longer alleges that it has been denied the opportunity to recover a return on capital improvements, or that it has otherwise been denied a fair return on its investment. Instead, it wrongly disputes the need to do so.

Thus, we conclude that the trial court properly sustained the city's demurrer to each of the causes of action. To the extent that Hillsboro is challenging the city's refusal to

authorize a "*Kavanau* adjustment," its claim fails because it does not allege the facts necessary to establish its right to such an adjustment, namely that enforcement of the ordinance has deprived it of a fair and reasonable rate of return on its investment. To the extent Hillsboro is seeking a writ of mandate to compel the city attorney to submit its application to the rent board, the trial court properly denied the petition because, like the complaint, the application did not allege that Hillsboro has been denied a fair rate of return. Without such an allegation, the city was under no obligation to consider the request for a *Kavanau* adjustment. And to the extent Hillsboro seeks to recover from the city for interfering with its ability to recover additional rental income, the complaint is insufficient because of the same failure to allege that without the additional rent Hillsboro was deprived of a fair return.

Moreover, under the circumstances the trial court was justified in denying Hillsboro leave to amend.[4] "If

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[4] The trial court denied Hillsboro the opportunity to amend its complaint because, it reasoned, "The prerequisites for '*Kavanau*' damages are a formal adjudication that an ordinance deprived a property owner of a 'fair return.' [Citation.] That allegation has not been made-nor can plaintiff make this allegation because plaintiff has not exhausted all of its administrative remedies." We do not believe the issue is one of exhaustion of remedies. The court's statement suggests that Hillsboro cannot obtain a *Kavanau* adjustment from the rent board until a court has found that the city imposed a confiscatory rent ceiling, and that a court may not adjudicate a claim that the ordinance is confiscatory until Hillsboro has sought an adjustment from the rent board. There is no such Catch-22. A judicial determination that a landlord has been deprived of a fair return is not a prerequisite to petitioning a local rent board for an adjustment. The local rent board is uniquely suited to the sort of fact finding inherent in determining whether a landlord has been deprived of a fair return on his or her investment. (See, e.g., *Concord Communities* v. *City of*

(continued...)

the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment." (*Schifando v. City of Los Angeles, supra*, 31 Cal.4th at p. 1081.) Here, leave to amend would be appropriate only if Hillsboro might be expected to add allegations denying the receipt of a fair return, but Hillsboro's position throughout has been that its right to recover is not dependant on the denial of a fair return. "[A]n abuse of discretion could be found [in denying leave to amend], absent an effective request for leave to amend in specified ways, only if a potentially effective amendment were both apparent and *consistent with the plaintiff's theory of the case.*" (*CAMSI v. Hunter Technology Corp.* (1991) 230 Cal.App.3d 1525, 1542, italics added.) Hillsboro has not argued that the trial court abused its discretion in denying leave to amend nor has it requested that the matter be remanded to permit leave to amend. Since the trial court correctly sustained the demurrer to the pleading before it and Hillsboro stands upon the sufficiency of that pleading, there is no need to provide leave to amend.

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[4] (...continued)
Concord (2001) 91 Cal.App.4th 1407, 1411-1412 [case remanded to rent board to consider whether base rent should be adjusted]; *Carson Harbor Village, Ltd. v. City of Carson* (9th Cir. 2004) 353 F.3d 824, 826 [rent board weighed evidence and determined allowable rent increase on a petition to obtain a return on investment]; see also *Williamson Planning Comm. v. Hamilton* (1985) 473 U.S. 172, 191.) Had Hillsboro sought an NOI increase or capital improvement adjustment based on the claim that enforcement of the rent control ceiling had deprived it of a fair return, and had the city attorney refused to permit the application to be considered because the denial of a fair return had not yet been adjudicated, the outcome here would have been different.

DISPOSITION

The judgment is affirmed.

Pollak, J.

We concur:

Parrilli, Acting P. 1.

Siggins, J.

A110441

Appendix A–20

Trial court:	Sonoma County Superior Court
Trial Judge:	Honorable Raymond J. Giordano
Counsel for plaintiffs and appellants:	David Spangenberg Healdsburg, CA R.S. Radford Lawrence G. Salzman Pacific Legal Foundation Sacramento, CA
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Appendix B-1

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IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SONOMA

HILLSBORO PROPERTIES, et al.,	CASE NO. SCV-235529
Plaintiff,	~~PROPOSED~~ ORDER SUSTAINING DEFENDANTS' DEMURRER AND DISMISSING PLAINTIFFS' APPEALS
v.	
ROHNERT PARK RENT BOARD, et al.,	COMPLAINT FOR DECLARATORY RELIEF; INJUNCTIVE RELIEF; INVERSE CONDEMNATION; DUE PROCESS; WRIT REVIEW OR OTHER APPROPRIATE EXTRAORDINARY RELIEF AND DAMAGES UNDER CCP § 1095
Defendants.	

Appendix B-2

Date: February 16, 2005
Time: 8:30 a.m.
Dept.: 20
Judge: Hon. Raymond J. Giordano

Filed: March 24, 2005

The above-captioned matter came on regularly for hearing before this Court on February 16, 2005, in Department 20 of the above-entitled Court, the Honorable Raymond J. Giordano presiding. Gabrielle Whelan of McDonough, Holland & Allen PC appeared for Rohnert Park Rent Appeals Board. David Spangenberg of the law offices of David Spangenberg appeared for Plaintiffs Hillsboro Properties, et al.

After full consideration of the admissible evidence and counsel's briefs and oral arguments, and GOOD CAUSE APPEARING, the Court finds as follows:

Each of Plaintiffs' claims are precluded by applicable statute of limitations. Plaintiffs' claims are either precluded by the five year statute of limitations for takings claims (*Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757) or the three year statute of limitations for a challenge to an ordinance set out in Code of Civil Procedure Section 338(a).

Moreover, Plaintiffs have not alleged any valid causes of action for a court-awarded "Kavanau increase." The pre-requisites for "Kavanau" damages are a formal adjudication that an ordinance deprived a property owner of a "fair return." (*Kavanau v. Santa Monica Rent control Board* (1997) 16 Cal.4th 761, 781. That allegation has not been made—nor can Plaintiff make this allegation because Plaintiff has not exhausted all of its administrative remedies.

NOW, THEREFORE, IT IS HEREBY ORDERED that Defendants' Demurrer is sustained without leave to amend; and

IT IS HEREBY FURTHER ORDERED that Plaintiffs' Complaint for Declaratory Relief; Injunctive Relief; Inverse Condemnation; Due Process; Writ Review or Other Appropriate Extraordinary Relieve and Damages under CCP § 1095, including Plaintiff's First throughTenth Causes of Action is dismissed in its entirety.

Dated: March 23, 2005

/s/ Raymond J. Giordano
RAYMOND J. GIORDANO
Judge of the Superior Court

APPROVED AS TO FORM:

LAW OFFICES OF DAVID SPANGENBERG

By: /s/ David Spangenberg
David Spangenberg, Attorney for
Hillsboro Properties

Appendix C-1

Court of Appeal, First Appellate District,
Div. 3 - No. A110441
S143408

IN THE SUPREME COURT OF CALIFORNIA

En Banc

HILLSBORO PROPERTIES, et al.,

Plaintiffs and Appellants,

v.

CITY OF ROHNERT PARK et al.,

Defendants and Respondents.

Petition for review DENIED.

SUPREME COURT
FILED
JULY 12, 2006
Frederick K. Ohlrich Clerk

_____
DEPUTY

GEORGE
Chief Justice

Appendix D-1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HILLSBORO PROPERTIES and Paul Goldstone Enterprises, Inc., a joint venture, dba Rancho Grande Mobilehome Park, Plaintiffs, v. CITY OF ROHNERT PARK, City of Rohnert Park Rent Appeals Board, Defendants.	**No. C93 1723 FMS** **JUDGMENT** Filed March 29, 1996

FERN M. SMITH, District Judge.

INTRODUCTION

This action arises out of a dispute over the constitutionality of an ordinance adopted by the voters of defendant CITY OF ROHNERT PARK ("the City"), on December 8, 1987. Plaintiff alleges that the City's Mobilehome Ordinance 494 ("Ordinance 494" or "the Ordinance") violates plaintiffs' due process rights, both on its face and as applied by defendant.

From 1988 to 1991, plaintiff made capital improvements to its property. On July 9, 1991, the Ninth Circuit Court of Appeals decided *Sierra Lake Reserve v. City of Rocklin,* 938 F.2d 951 (Ninth Circuit 1991), vacated on other grounds, 113 S. Ct.31 (1992), holding cognizable a landlord's

claim that an ordinance similar to Ordinance 494 violated his due process rights by failing to provide, through allowable rent increases, for a profit on capital improvement investments. Regarding compensation of a landlord for improvement expenditures, the Ninth Circuit stated clearly that, "[b]reaking even is not enough [to satisfy due process]; the law must provide for a profit on one's investment," *id.* at 958.

On October 8, 1991, plaintiff's attorney, David Spangenberg, wrote to the Rohnert Park City Attorney, John Flitner, regarding the *Sierra Lake* case and its effect on the Ordinance. Spangenberg stated that the Ordinance, by allowing adjustments for capital improvements only when they are part of an NOI adjustment, which does not provide for a return of profit, violates substantive due process under *Sierra Lake.* The letter suggested that plaintiff was legally able to file a federal court action and requested that the City amend its regulations to comply with the law.

On November 5, 1991, Flitner sent a memo regarding Spangenberg's letter to the Board in which he opined that *Sierra Lake* did not affect the legality of the Ordinance. Flitner suggested that the NOI provision of the Ordinance satisfied *Sierra Lake* and that a federal action was not possible because plaintiff had adequate state remedies. Skip Green of plaintiff HILLSBORO PROPERTIES apparently solicited a petition from Carl Leivo, Assistant City Manager of Rohnert Park, and received a petition for a NOI adjustment pursuant to Sections 6 and 7 of the Ordinance. On February 25, 1992, Green wrote to Leivo, explaining that plaintiff sought a rent increase to provide for a profit on capital improvements and not a NOI adjustment; he attached a calculation of plaintiff's requested adjustment and a copy of Spangenberg's October, 1991, letter to Flitner detailing plaintiff's argument under *Sierra Lake.* Green stated that he had attempted to use the NOI petition form to document plaintiff's request, but that it was inadequate. He requested that

defendant "[p]lease accept this cover letter and attachment as a formal application for a rent increase under the Rohnert Park ordinance." In a memo of March 2, 1992, Leivo told the Board that plaintiff's request failed to comply with the rules and regulations. He suggested that the Board either refuse to accept the request as a reviewable petition or treat it as a petition but reject it without prejudice to a proper refiling. The Board considered the matter at its March 5, 1992 meeting. Leivo notified Green on March 16, 1992 that the Board "ha[d] decided that the rules and regulations of Ordinance 494 provide [sic] adequate due process to a parkowner for recovery of capital expenditures through the regular petition process." Leivo suggested that Green "refer to the rules and regulations for the proper submittal of a rent adjustment request."

The parties repeated this entire sequence during October and November, 1992. Green reiterated plaintiff's position in an October 20 letter, requesting that "[s]ince the [ordinance] does not have a capital improvement form for submittal, please present our application to the [Board] as submitted." Leivo apparently solicited Flitner's opinion regarding the request, and Flitner responded by letter on October 30. Flitner articulated his belief that *Yee v. City of Escondido,* 503 U.S. 519, 112 S. Ct. 1522 (1992), diminished the importance of *Sierra Lake* to this dispute and he reiterated his position that Sections 6 and 7 of the Ordinance provide a constitutionally sufficient procedure for requesting rent adjustments. Spangenberg and Green appeared at the Board's meeting of November 5, 1992, and argued their position that, because plaintiff was not requesting a NOI adjustment, the petition form was inadequate. Spangenberg explained that plaintiff was seeking an adjustment to provide for a profit on new investments, which is not contemplated by the NOI adjustment. The Board stated that the "place on the form for capital improvements" was sufficient and made pronouncements as to the constitutionality of Ordinance 494.

Leivo informed Green on November 13, 1992 that plaintiff's second request had been dismissed because "the Board ha[d] decided that Chapters 5 and 7 of the Rules and Regulations and Sections 6 and 7 of Ordinance 494 provide adequate due process to a parkowner for recovery of capital expenditures." Leivo again suggested that only requests submitted on the NOI petition form would be considered by the Board. Green wrote back to Leivo on November 19, arguing that *Sierra Lake* declared adjustment rights that the petition form was not designed to address. He acceded to the board's demands, however, attaching a partially completed NOI form. Leivo sent a letter to Green on November 25, notifying him that Leivo and Flitner had analyzed plaintiff's request and finding it "either erroneously completed or incomplete in several areas," had rejected it. Leivo stated that (1) If plaintiff was contending that its request should be considered "even though Ordinance 494 does not provide for such applications, [defendant] must abide by the existing Ordinance and regulations and not accept" it, but (2) if plaintiff was attempting to work within the NOI petition framework, its application was incomplete. Spangenberg appeared at the board's meeting of February 4, 1993, to argue plaintiff's position again. The minutes of that meeting indicate Board Member Collins' statement of the Board's position: "Collins again asked if Mr. Spangenberg understood the information required on the Ordinances' NOI petition form. She stated that until it was proved in the courts that Ordinance 494 was defective, it [the NOI form] was the only way the Board would consider a petition. It was not enough to fill out the form consistent with the *Sierra Lakes* [sic] case."

Spangenberg declared that he had made a record that plaintiff had submitted an application which was rejected, and "Chairperson Brody confirmed that Board members had not changed their opinion in rejecting the petition request as

incomplete and as being in noncompliance with Ordinance 494 and its rules and regulations."

Plaintiff moves for summary judgment "on the grounds that . . . plaintiffs' [[[sic] federal substantive due process rights were denied in violation of 42 U.S.C. [section] 1983."

The court finds that Ordinance 494 as originally drafted by the voters violates the Fourteenth Amendment on its face because it does not allow mobilehome parkowners to collect any profit on new capital improvements. *Sierra Lake* held that a landlord stated a cognizable substantial due process claim "to the extent it complain[ed] that [an ordinance] deprived it of a 'fair and reasonable' return on its investment by . . . limiting the amount it may recover on account of . . . improvements [made after the ordinance was enacted]." *Sierra Lake,* 938 F.2d at 958 (citing *Guaranty Nat'l Ins. Co. v. Gates,* 916 F.2d at 508, 512-14, and n.4 (9th Cir. 1990)). "Under *Guaranty National,* every dollar the landlord puts into the property by way of capital improvements constitutes an investment in the property for which a 'fair and reasonable' return must be allowed. Breaking even is not enough; the law must provide for a profit on one's investment." *Id.* (citing *Guaranty National,* 916 F.2d at 515). *Sierra Lake* demands that the profit always be provided. Since Ordinance 494 fails to provide a mechanism which necessarily affords landlords the opportunity to receive a profit on their capital improvement investment, it violates substantive due process on its face and is unconstitutional and has been from its inception.

The court notes that the City has promulgated amendments to its Municipal Code which purportedly allow a parkowner to obtain a fair rate of return on new capital improvements. As a result of those amendments to the Municipal Code, the tenants of plaintiff and the City have entered into a voluntary stipulation allowing the parkowner to

pass through to the tenants in the form of a limited duration rent increase the cost of those capital improvements, together with a profit on those new investments in the park. This court does not pass on the constitutionality of those amendments to the Municipal Code, but only finds that the original Ordinance 494, as adopted by the voters on December 8, 1987, is unconstitutional and has been from its inception.

Appendix E-1

NOT FOR CITATION

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

INDIAN SPRINGS LTD., a
California Limited Partnership, et al.,

Plaintiffs,

No. C-00-2588
PJH (ADR)

v.

CITY OF ROHNERT PARK,

Defendant.
_____/

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The parties' cross-motions for summary judgment came on for hearing on November 27, 2002, before this court, the Honorable Phyllis J. Hamilton presiding. Plaintiffs appeared by their counsels David Spangenberg, Frederik A. Jacobsen, and Mark Hynes. Defendants appeared by their counsel Michelle Marchetta Kenyon. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court hereby rules as follows.

Appendix E-2

BACKGROUND

In 1987, the voters of the City of Rohnert Park adopted Ordinance No. 494, which established rent control for mobile home parks. Rohnert Park Request for Judicial Notice ("RJN") Exh. B. This Ordinance was codified at Rohnert Park Mun. Code Ch. 9.70. Id. Exh. A. In 1993, two of the plaintiffs in this action filed suit in this district against Rohnert Park, claiming that Ordinance No. 494 was unconstitutional because it did not permit trailer park owners to earn a reasonable rate of return on the cost of capital improvements, in violation of the 5th Amendment's takings clause. The court ruled in favor of the plaintiffs on summary judgment, and invalidated Ordinance No. 494 on April 30, 1994 as violating substantive due process. Complaint Exh. A.

After the district court granted summary judgment, the Rohnert Park City Counsel placed a proposition on the ballot to permit it to pass an amendment purporting to cure Ordinance No. 494's constitutional defects by adding language permitting the pass-through of capital improvements on mobile home properties. That proposition, Measure L, was approved on November 8,1994, and the amendment was enacted as Ordinance No. 599, on January 24,1995. RJN Exhs. C-D.

The district court entered judgment in the lawsuit over Ordinance No. 494 on March 29, 1996. That judgment ruled only that Ordinance No. 494 was invalid and specifically declined to rule on Ordinance No. 599. Complaint Exh. B at 6-7. Rohnert Park appealed the judgment, but the Ninth Circuit remanded to the district court to determine whether the case concerning Ordinance No. 494 was moot in light of Ordinance No. 599. On March 25, 1998, the district court once again explicitly declined to rule on the constitutionality of Ordinance No. 599 for lack of ripeness (since the plaintiffs had not raised the issue in that case), but also declined to vacate the judgment

finding Ordinance No. 494 unconstitutional. RJN Exh. M at 3-6 ("The Court confirms, however, that the earlier judgment declared unconstitutional only the original Ordinance. The Court has never ruled, and does not now rule, on the constitutionality of the amended Ordinance"). The parties appealed again, but dismissed the appeal on June 27, 2000.

Plaintiffs filed a new action on July 18, 2000, requesting a declaratory judgment that Rohnert Park is wrongfully enforcing Ordinance No. 494, and also claiming that Rohnert Park Mun. Code Ch. 9.70, as drafted and amended, violates, on its face, the 5th and 14th Amendments under 42 U.S.C. § 1983. For the purposes of this motion, plaintiffs concede that Ordinance 599 and Measure L are otherwise constitutional, but argue that Rohnert Park committed procedural errors in enacting them such that they are not effective as law.

DISCUSSION

A. Section 1983 claims

Because the 5th and 14th Amendments do not create a private cause of action, a party claiming violation of those rights must bring the claim under 42 U.S.C. § 1983. A section 1983 claim pending in a California court must be brought within one year. Tahoe-Sierra Preservation Council. Inc. v. Tahoe Regional Planning Agency, 216 F.3d 764, 786 n. 42 (9th Cir. 2000) (citations omitted); Cal. Civ. Code § 338(a). A facial challenge to a statute for a violation of the takings clause begins to accrue upon the passage of the ordinance that the plaintiff alleges takes the property in question without just compensation. Levald v. City of Palm Desert, 998 F.2d 680, 688 (9th Cir. 1993).

Plaintiffs claim that even though they did not bring suit until 2000, five years after the enactment of Ordinance No. 599,

the statute of limitations was tolled because of Rohnert Park's continuing enforcement of the mobile home rent control law, citing Howard Jarvis Taxpayers' Association v. City of La Habra, 25 Cal. 4th 809,821 (2001) (new cause of action accrued each time city charged a tax under an ordinance that was improperly passed).

Howard Jarvis, though, specifically states that its holding applied only to tax measures. 25 Cal. 4th at 825. Here, Rohnert Park is not assessing a tax - or even charging fees - against the plaintiffs. Furthermore, Howard Jarvis only applies for matters arising under the general three-year statute of limitations of Cal. Code Civ. Proc., where no other statute of limitation applies. 25 Cal. 4th at 825. For matters with a specific statute of limitation, the Howard Jarvis tolling exception does not apply. Utility Cost Mgmt. v. Indian Wells Valley Water Dist., 26 Cal. 4th 1185, 1195 (2001); Travis v. County of Santa Cruz, 100 Cal. App. 4th 609, 636 (2002). Since § 1983 actions are specifically governed by the one-year statute of limitations under Cal. Civ. Code § 338(a), Howard Jarvis is inapplicable.

The plaintiffs also argue that their claims were tolled because Rohnert Park continued to pursue an appeal of the previous district court decision concerning Ordinance No. 494.[1]

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[1] Plaintiffs also cite a Sixth Circuit case, Gordon v. City of Warren, 579 F .2d 386, 391 (6th Cir. 1978), for the proposition that bringing an appeal will toll the statute of limitations. Gordon, though, involved a situation where the city had issued a stop order during the pendency of the appeal that prevented the plaintiff from construction under an ordinance that was subsequently found unconstitutional. Id. Here, there was no bar to the plaintiffs raising their claims concerning Measure L and Ordinance No. 599 as soon as the purported amendments passed.

But the first litigation did not involve Measure L or Ordinance No. 599. If plaintiffs felt that Measure L and Ordinance No. 599 were incorrectly promulgated, they were obliged to bring suit no later than a year after those measures passed in 1995. See e.g., Levald, 998 F.2d at 688 (one-year statute of limitations applied to a facial challenge to the constitutionality of a mobile home ordinance under § 1983).[2]

Giving plaintiffs every benefit of the doubt, it is possible that the plaintiffs believed that the constitutionality of the amended Ordinance might already be at issue in the first litigation, which could potentially have tolled the statute. The district court, however, affirmed as early as March 29, 1996 in the judgment that it was not. Complaint Exh. B at 6 ("This court does not pass on the constitutionality of those amendments to the Municipal Code [Ch. 9.70]").[3] Since the § 1983 actions are time-barred under either scenario, this court does not decide which specific date triggered the statute of limitation in this matter, and finds only the section 1983 claims are time-barred.

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[2] Rohnert Park Mun. Code Ch. 9.70 was subsequently amended a number of times after 1995. See RJN Exh. A. Those amendments do not relate to the provisions concerning capital improvement pass-throughs and thus do not toll the statute of limitations. See Travis, 100 Cal. App. 4th at 635-36 (only amendments that affect the substantive right in question will trigger the statute of limitations).

[3] The subsequent procedural history in the first action thus went only to the court's jurisdiction over Ordinance No. 494 and not Measure L or Ordinance No. 599, and thus do not toll the statute beyond March 29, 1996.

B. Declaratory Judgment

Plaintiffs next request a declaratory judgment that Measure L and Ordinance No. 599 did not serve to revive Ordinance No. 494. Plaintiffs argue that the implementations of Measure L and Ordinance No. 599 were procedurally incorrect, and further claim that a statute found to be unconstitutional is void and cannot subsequently be amended unless the statute is re-enacted.

1. Enabling Clause

Plaintiffs first claim that Rohnert Park Muni. Code Ch 9.70 is invalid because Measure L violated the law by failing to provide an enabling clause stating: "the People of the City of Rohnert Park do ordain as follows." While the relevant statute, Cal. Elections Code § 9224,[4] suggests such language, the statute requires only that the enabling clause be "substantially" in that form.[5]

The enabling clause enacting Measure L's amendments to Ordinance No. 494 states "Section 9.70.132 is hereby added to the Rohnert Park Municipal Code to provide as follows." RJN Exh. D at ¶ 9. This is substantially equivalent to the model provided in Cal. Elec. Code § 9224 and thus permissible. See 20 C.J.S. Counties § 90 ("Where the subject matter of the order or ordinance is within the jurisdiction of the board, substantial compliance is sufficient, and the order or ordinance

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[4] Plaintiffs Incorrectly cite this as "Government Code § 9224."

[5] The 1888 case cited by plaintiffs, People v. Russell, 74 Cal. 578, 578, relates to a county ordinance predating Cal. Elections Code § 9224. That ordinance mandated enabling clause language and thus did not permit mere "substantial" compliance.

will not be declared invalid for mere informalities or irregularities . . .") (citations omitted).

2. Republication of Ordinance No. 494 in the text of Measure L

Plaintiffs next argue that Measure L is invalid because it failed to republish the entirety of Ordinance No. 494 in its text and cited only Ordinance No. 494's title instead, which they claim is in violation of Art. IV § 9 of the California constitution. A request for the invalidation of an ordinance on these grounds was called a "startling argument" and rejected as "an obviously untenable contention" in Glendale Unified Sch. Dist Of Los Angeles County v. Vista del Rossmoyne Co., 232 Art. IV § 9 is to avoid confusion in the editing process when specific words or sentences are changed within the context of a larger act, and that it was not intended to apply to "self-sufficient and complete legislative pronouncements, even if they might be said to 'amend' other earlier acts by implication"). Republication of Ordinance No. 494 in the text of Measure L is not required.

3. Urgency Designation

Next, Plaintiffs argue that Ordinance No. 599 is invalid because it was improperly passed as an "urgency ordinance." Plaintiffs argue that Ordinance No. 599 did not contain "findings of fact or other language indicating why it is urgent," as required by Cal. Gov. Code § 36937(b). Plaintiffs also advance a number of reasons why there was no urgency in the passing of a pass-through capital improvements law.

Ordinance No. 599 does contain findings of fact supporting its urgency. RJN Exh. C § 1 ¶¶ 1-7. Those findings of fact explain that the Ordinance was considered urgent so the

City could immediately mitigate any damages suffered and to ensure that rents, which is collected on a month-to-month basis, would be properly calculated as soon as possible.

The court defers to the legislature in determining whether an emergency exists. "Where the facts constituting the emergency or urgency are recited in the ordinance and are such that they may reasonably be held to constitute an emergency, the courts will not interfere, and they will not undertake to determine the truth of the recited facts." Crown Motors v. City of Redding, 232 Cal. App. 3d 173, 179 (1991) (citation omitted). Ordinance No. 599 was properly designated as an urgent measure.[6]

4. Amending a Void Law

Finally, plaintiffs claim that Rohnert Park may not amend its Municipal Code Ch. 9.70 at all, because that statute was rendered void when district court found Ordinance No. 494 unconstitutional, and Rohnert Park thus cannot make additions to a law that no longer exists.

This is incorrect. "If the Acts as amended are valid, their prior invalidity on constitutional grounds is immaterial." Howard Jarvis Taxpayers' Ass'n. v. State Board of Equalization, 20 Cal. App. 4th 1598, 1605 (1993), citing County of Los Angeles v. Jones, 6 Cal. 2d 695, 708 (1936) ("an amendment to a statute which for any reason has been declared

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[6] The cases cited by plaintiffs are distinguishable. County of Los Angeles v. City Council of Lawndale, 202 Cal. App. 2d 20 (1962), involved an ordinance which could not be designated urgent as a matter of law, and West Hollywood Concerned Citizens v. City of West Hollywood, 232 Cal. App. 3d 486 (1991) involved an ordinance with no findings of fact that was nonetheless designated as urgent. Neither of those situations apply here.

invalid constitutes a valid enactment"). See also Kopp v. Fair Political Practices Commission, 11 Cal. 4th 607, 623 (1995) (a void statute may be corrected by either legislative or judicial amendment; "a statute declared unconstitutional is void in the sense that it is inoperative or unenforceable, but not void in the sense that it is repealed or abolished") (citations omitted).[7]

None of the alleged procedural errors rise, either individually or collectively, to a level warranting invalidation of Measure L and Ordinance No. 599, and Rohnert Park was entitled to repair Ordinance No. 494 by adding a pass-through capital improvements provision as it did. Rohnert Park thus acted properly in passing Measure L and Ordinance No. 599 to amend Rohnert Park Mun. Code Ch. 9.70 and plaintiffs' request for declaratory judgment is denied.

Plaintiffs' motion for summary judgment is thus DENIED and defendant's motion for summary judgment is GRANTED. This order fully adjudicates the matters listed at nos. 31 and 35 on the clerk's docket for this case, and all other matters pending on the clerk's docket for this case. The clerk shall close the file.

IT IS SO ORDERED.

Dated: December 2, 2002

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[7] The case cited by plaintiffs at oral argument, City of Orange v. W.E. Clement, 41 Cal. App. 497 (1919), holds that the proceedings of a special meeting of a city's board of trustees are void when the meeting is improperly called. Plaintiffs have not alleged that Rohnert Park's City Council enacted Ordinance No. 599 at an improper meeting.

/s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge

Copies mailed to counsel of record

Appendix F-1

Title 9 PUBLIC PEACE, MORALS AND WELFARE

Chapter 9.70 MOBILE HOME ORDINANCE*

Editor's Note:

9.70.010 Findings and purpose.

9.70.020 Definitions.

9.70.030 Rent appeals board.

9.70.040 Maximum allowable rents.

9.70.042 Vacancy control.

9.70.044 Prospective homeowner rights.

9.70.050 Annual general adjustment.

9.70.055 Limits to annual general adjustment formula.

9.70.060 Individual adjustment of ceiling on allowable rents.

9.70.062 Rental adjustment allowed for capital improvement, procedure for granting.

9.70.070 Individual rent adjustment hearings.

9.70.080 Just cause for eviction.

9.70.090 Non-waiverability.

9.70.100 Judicial review.

9.70.110 Civil remedies.

9.70.120 Injunctive relief.

9.70.130 Partial invalidity.

9.70.132 Amendment.

9.70.150 Retaliation.

Editor's Note:

* Editor's Note: Ordinance No. 494 contained herein was adopted by Initiative Election held on December 8, 1987. Measure L, passed by the voters on November 8, 1994 amended Section 9.70.132 to allow city council to amend Ordinance No. 494 (Chapter 9.70) after public hearing before the rent appeals board and a four/fifths vote of the city council.

Ordinance No. 495 repealed the provisions of Ordinance No. 487 which added Chapter 9.68, entitled Mobile Home Space Rent Adjustment and Registration, to the Code.

9.70.010 Findings and purpose.

The purpose of this chapter is to alleviate the hardship of unreasonable rent increases while still assuring owners' right to a fair return.

A. The city council finds the following conclusions to be true and correct:

1. In Rohnert Park, there are five mobile home parks containing one thousand three hundred seventeen spaces, of which one thousand three hundred nine spaces are available for rental to mobile home coach owners (in 1995).

2. Mobile homes provide an important form of affordable housing for a substantial number of Rohnert Park residents.

3. The majority of mobile home park homeowners/residents are age fifty-five or older.

4. The majority of mobile home park homeowners/residents own the mobile homes which they occupy and many of these homeowners/residents typically have substantial loan payments to meet in addition to rent payments.

5. The Rohnert Park General Plan recommends that the city maintain and preserve its existing stock of affordable housing of which mobile home park spaces are typically an example.

6. Studies undertaken in surrounding areas have shown that typical moving costs for mobile homes from one mobile home park to another (if vacant spaces could be located) range from approximately five thousand dollars to nine thousand dollars, depending upon the size of the mobile home. In many instances, removal requires a separation of the mobile home unit from appurtenances which have been made permanent, thus creating severe damage and depreciation in value to the mobile home.

7. Mobile homes and manufactured housing have represented an affordable form of shelter to citizens of Rohnert Park with modest incomes. Because mobile homes are often owned by senior citizens, persons on fixed incomes, and persons of low and moderate income, space rent increases can have a significant impact on these families.

8. The need for effective and fair mobile home park space rent stabilization continues to exist in Rohnert Park.

9. It would be desirable to provide prospective homeowners/residents of mobile home coaches with an option to choose between a long-term lease and a periodic tenancy of less than one year in duration. Such an option furthers a legitimate governmental objective and is not in conflict with or preempted by state law.

10. On average, several mobile home coaches are sold or offered for sale each year in Rohnert Park. It would be highly desirable to provide vacancy control in the rent stabilization program as hereunder provided.

11. The city further finds that this article is necessary to preserve public health, welfare, and safety.

12. There exist substantial differences in space rents within given mobile home parks in Rohnert Park.

B. The purpose of this chapter is to stabilize the rate of mobile home park space rental in order to:

1. Prevent exploitation of a shortage of vacant mobile home park spaces should it occur;

2. Prevent excessive and unreasonable mobile home park space rent increases while still assuring park owners' right to a fair return;

3. Provide a process for ensuring mobile home park owners a fair, just and reasonable rate of return on their parks in cases where the guaranteed annual space rent increase provided by this chapter proves insufficient.

4. Assist in protecting affordable housing to help provide a variety of housing types within a range of costs affordable to the low and very low income households.

5. Rectify the disparity of bargaining power which exists between mobile home park homeowners/residents and/or prospective homeowners/residents and mobile home park owners. (Ord. 612 §§ 2, 3, 1996: Ord. 607, 1995: Ord. 494 § 1, 1987)

9.70.020 Definitions.

The following words and phrases, as used in this chapter, shall have the following meanings:

A. "Base rent ceiling" means the maximum allowable rent established by the rollback of rents described in subsection B. of Section 9.70.040.

B. "Board" means the rent appeals board established by Section 9.70.030 of this chapter.

C. "Commissioners" means the commissioners of the rent appeals board, as established by Section 9.70.030.

D. "Controlled rental spaces" means mobile home spaces, and uses of its club house, pools, sauna, jacuzzi, and other public areas.

E. "Rental housing agreement" means an agreement, verbal, written or implied, between a landlord and homeowner/resident for use or occupancy of a rental space for housing services.

F. "Rent ceiling" means the limit on the maximum allowable rent which a landlord may charge on any controlled rental space.

G. "Homeowner/resident" means a homeowner, resident, subtenant, lessee, sublessee, or any other person entitled under

the terms of the rental housing agreement to the use or occupancy of any rental space.

H. "Consumer Price Index" means the Consumer Price Index for urban wage earners and clerical workers in the United States.

I. "Management" means the owner of a mobile home park or an agent or representative authorized to act on the owner's behalf.

J. "Owner" means any landlord, owner, lessor, or sublessor of a mobile home park in Rohnert Park.

K. "Prospective homeowner" means a person who is not currently a resident in a mobile home park but is a prospective mobile home space resident who desires the use of a mobile home space and has presented himself/herself to the park owner/management as such, or who is a current resident in a mobile home park who desires to occupy another mobile home space in that park.

L. "In-place transfer" means a mobile home coach transferred by the homeowner/resident to another with the mobile home coach remaining on the space. (Ord. 658 § 1, 2000; Ord. 610 §§ 2, 3, 1996: Ord. 607, 1995: Ord. 494 § 2, 1987)

9.70.030 Rent appeals board.

A. Composition. There shall be in the city a rent appeals board. The board shall consist of five appointed commissioners. The board shall elect annually as chairperson one of its members to serve in that capacity.

B. Eligibility. Residents of the city who are duly qualified electors of the city are eligible to serve as commissioners of the rent appeals board.

C. Full disclosure of holdings. Candidates for the position of commissioner shall submit a verified statement listing all of their interests and dealings in real property, including but not limited to its ownership, sale or management, and investment in and association with partnerships, corporations, joint ventures and syndicates engaged in its ownership, sale or management during the previous three years.

D. Appointment of commissioners. Commissioners shall be appointed by the city council within thirty days after the adoption of the ordinance codified in this chapter.

E. Term of office. Commissioners shall be appointed to serve for a two year term. There shall be no limitation on the number of terms a commissioner may serve.

F. Powers and duties. The board is empowered to set the rent ceiling for all controlled rental spaces. The board is empowered to require registration of all controlled rental spaces under this section. The board is empowered to use city staff, issue orders, rules and regulations, conduct hearings, and charge fees as set forth below. The board may make such studies and investigations, conduct such hearings, and obtain such information as necessary to carry out its powers and duties. The board is empowered to settle civil claims under section 9.70.110, and seek injunctive relief under section 9.70.120.

G. Rules and regulations. The rent appeals board shall issue and follow such rules and regulations, including those which are contained in this chapter, as will further the purposes of this chapter. The board shall publish its rules and regulations prior to promulgation in at least one newspaper in general circulation

in the city. The board shall hold at least one public hearing to consider the views of interested parties prior to adoption of general rent levels or maximum rent ceilings, or any decision decontrolling or reimposing rent stabilizations on any category or classification of rental spaces. All rules and regulations, internal staff memoranda, and written correspondence explaining the decisions and policies of the board shall be kept in the board's office, and shall be available to the public for inspection and copying. The board shall publicize this chapter through the media of signs, advertisements, fliers, leaflets, announcements on radio, newspapers, and other appropriate means, so that all residents of Rohnert Park will have the opportunity to become informed about their legal rights and duties under rent stabilization in Rohnert Park.

H. Meetings. The board shall hold at least one regularly scheduled meeting per month. Special meetings may be called at the request of at least two commissioners. All meetings shall be open to the public. Individual maximum rent adjustment hearings shall be conducted in accordance with the provisions of sections 9.70.060 and 9.70.070.

I. Quorum. Three commissioners shall constitute a quorum for the board.

J. Voting. The affirmative vote of three commissioners of the board is required for a decision, including all motions, regulations and orders of the board.

K. Dockets. The board shall maintain and keep in its office all hearing dockets.

L. Vacancies. If a vacancy occurs on the board, the city council shall appoint a qualified person to fill such a vacancy.

M. Staff. The board shall employ the existing staff to perform its functions efficiently, in order to fulfill the purposes of this chapter.

N. Financing. The board shall finance its reasonable and necessary expenses by charging landlords annual registration fees, as set by the rent board, to cover administrative costs. Such registration fees shall be passed on to the homeowners/residents in the form of rent increases prorated over the year. The board is also empowered to request and receive funding, when and if necessary, from the city and/or any other available source, for its reasonable and necessary expenses.

O. Registration. Within thirty days after the initial board meeting, the board shall require the registration of all controlled rental spaces, which shall be re-registered annually, at times deemed appropriate by the board. The initial registration shall include the rent in effect on December 1, 1985, the date of the adoption of the ordinance codified in this chapter, the address of the rental space, the name and address of the landlord, the housing services provided to the space, a statement indicating all operating-cost increases since the rollback date, and any other information deemed relevant by the board. If the landlord has willfully and knowingly failed to register a controlled rental space, the board may authorize the homeowner/ resident of such a nonregistered controlled rental space to withhold all or a portion of the rent for the space until such time as the rental space is properly registered. After a rental space is properly registered, the board and/or a hearing examiner shall determine what portion of the withheld rent is owed to the landlord for the period in which the rental space was not properly registered. Whether or not the board allows such withholding, no landlord who has failed to register properly shall at any time increase rents for controlled rental spaces until such spaces are properly

registered. (Ord. 622 § 2, 1996: Ord. 607, 1995: Ord. 599 § 3, 1994: Ord. 494 § 3, 1987)

9.70.040 Maximum allowable rents.

A. Temporary freeze. Rents shall not be increased during the period of time between the date of the adoption of this ordinance and the rollback date determined under subsection B. of section 9.70.040.

B. Rollback and establishment of base rent ceiling. Thirty days after the adoption of this ordinance, no landlord shall charge rent for any controlled rental spaces in an amount greater than the rent in effect on December 1, 1985, until and unless the rent ceiling is adjusted under sections 9.70.050 and/or 9.70.060. If there was no rent in effect on December 1, 1985, the base rent shall be the rent in effect the last time the space was rented prior to December 1, 1985 adjusted by the percentage increase in the Consumer Price Index (CPI) between the last date of rental and December 1, 1985.

C. Posting. As soon as the landlord is aware of the maximum allowable rent, the landlord shall post it for each space, in a prominent place in or about the affected controlled spaces. The board may require that other information it deems relevant also be posted. (Ord. 494 § 4, 1987)

9.70.042 Vacancy control.

A park owner is prohibited from raising rent upon re-rental or re-lease of a mobile home on-site to a prospective homeowner/resident or current homeowner/resident. Mobile home spaces that are "new construction" as defined in Civil Code section 798.7 are exempted in accordance with Civil Code section 798.45. (Ord. 612 § 3, 1996)

9.70.044 Prospective homeowner rights.

Any person who is a prospective homeowner as defined in section 9.70.020.K must be offered the option of renting a mobile home space in a manner which will permit the prospective homeowner to receive the benefits of this chapter which includes, but is not limited to, rental of a mobile home space on a month-to-month basis, and a new base rent as set forth in section 9.70.042. Such a person cannot be denied the option of a tenancy of twelve months or less in duration. The park owner/management shall inform the prospective homeowner of their options under this clause. (Ord. 612 § 3, 1996)

9.70.050 Annual general adjustment.

On or after February 1st of each year, the maximum allowable rent for a rental space may be increased without application to the board in an amount not to exceed one-half of one percent less than one hundred percent of the increase in the CPI during the preceding twelve months. Such increase shall be equal to one-half of one percent less than the percentage increase in the CPI last reported as of September of the prior year and the month of September of the current year.

Such increase shall be annually calculated by the board. The amount of such permitted increase shall be rounded to the nearest one-tenth of one percent. In the event that the CPI decreases, no increase or decrease in rents shall be authorized pursuant to this section.

Said increase shall be annually calculated by the board. The amount of said permitted increase shall be rounded to the nearest one-tenth of one percent. In the event that the CPI decreases, no increase or decrease in rents shall be authorized pursuant to this section.

However, in no case shall the annual general adjustment exceed four percent.

A. Announcement of amount of annual general adjustments. The amount of the annual general adjustment shall be announced by the board on or before December 15 of each year and there shall be a mailing to homeowners/residents and landlords indicating the amount and conditions for said increase.

B. Extra increases for landlords who pay for gas and/or electricity. At the time of the annual adjustment permitted under paragraph B. of this section, a landlord providing electricity and/or gas utilities to a homeowner/resident without charge may increase the rent by an additional one-half of one percent of the rent for each utility provided.

C. Banking. Rent increases allowed under this section may be accumulated and implemented by the landlord at any future time.

D. Preconditions to the right to take annual general adjustments. A landlord who is not in compliance with any of the provisions of this chapter shall not demand, accept or retain the annual rent increase otherwise permitted by this section.

No landlord shall increase rent under this section if:

1. He/she has failed to comply with any provision of this chapter and/or regulations issued thereunder by the board; or

2. He/she has failed to comply substantially with the city health and building codes, and/or any applicable state or local housing, health and safety codes. (Ord. 658 § 2, 2000; Ord. 612 § 3, 1996: Ord. 607, 1995: Ord. 599 § 4, 1994: Ord. 494 § 5, 1987)

9.70.055 Limits to annual general adjustment formula.

In the event the vacancy control provision in section 9.70.042, or the prospective homeowner rights in section 9.70.044 is (are) invalidated in any way or by any authority, then the following section shall be enforced: section 9.70.050. Annual general adjustment formula will revert to seventy-five percent of the CPI with a four percent cap. (Ord. 612 § 3, 1996)

9.70.060 Individual adjustment of ceiling on allowable rents.

Any landlord or homeowner/resident can appeal for an individual adjustment of the maximum allowable rent.

A. Substantive grounds for rent adjustment applied for by landlords. A rent adjustment shall be approved in order to provide a just and reasonable return and maintain net operating income in accordance with the following criteria:

1. Fair net operating income. Fair return applications shall be considered according to the following guidelines:

a. Net operating income equals gross income minus operating expenses.

b. Gross income equals the following:

(i) Gross rents, computed as gross rental income at one hundred percent occupancy; plus

(ii) Interest from security and cleaning deposits (except to the extent that said interest is payable to the homeowners/residents); plus

(iii) Income from services, garage and parking fees; plus

(iv) All other income or consideration received or receivable for or in connection with the use or occupancy of rental spaces and housing services; minus

(v) Uncollected rents due to vacancy and bad debts to the extent the same are beyond the landlord's control. Uncollected rents in excess of three percent of gross rents shall be presumed to be unreasonable unless established otherwise.

c. Operating expenses-inclusions: Operating expenses shall include the following: license fees, real property taxes, utility costs, insurance, maintenance, management expenses (contracted or owner performed), including necessary and reasonable advertising, accounting, other managerial expenses, normal repair and maintenance expenses, allowable legal expenses, and the amortized cost of capital improvements. Management expenses are presumed to be six percent of gross income, unless established otherwise.

Owner-performed labor shall be counted at reasonable rates as established by board regulation.

Building improvements, major repairs, replacement and maintenance subject to the condition that said expenses shall be amortized in accordance with board regulations, except to the extent such costs are compensated by insurance proceeds.

d. Excluded from operating expenses. Operating expenses shall not include: avoidable and unnecessary expense increases since the base year, mortgage interest and principal payments, fees, penalties and interest awarded for violation of this or any other law, or legal fees except as provided in this subsection and depreciation of the property.

Allowable legal expenses shall include attorney's fees and costs incurred in connection with successful good faith attempts to

recover rents owing and successful good faith unlawful detainer actions not in violation of applicable law, to the extent the same are not recovered from homeowners/residents. Attorney's fees and costs incurred in proceedings before the board, or in connection with civil actions against the board, are not allowed as operating expenses.

e. Base year for the purpose of this section shall be 1985.

f. Presumption of fair base year net operating income. Except as provided in subparagraph g., it shall be presumed that the net operating income produced by the property during the base year provided a fair return (fair net operating income). Landlords shall be entitled to earn a just and reasonable return and to maintain and increase their base year net operating income in accordance with subparagraph h. herein.

g. Rebutting the presumption. It may be determined that the base year net operating income yielded other than a fair return, in which case, the base year net operating income may be adjusted accordingly. In order to make such a determination, the board must make at least one of the following findings:

(i) The landlord's operating and maintenance expenses in the base year were unusually high or low in comparison to other years. In such instances, adjustments may be made in calculating such expenses so that the base year operating expenses reflect average expenses for the property over a reasonable period of time. In considering whether the base year net operating income yielded more or less than a fair net operating income, the board shall consider the following factors:

(a) The landlord made substantial capital improvements during the base year, which were not reflected in the base year rent levels;

(b) Substantial repairs were made due to damage caused by uninsured disaster or vandalism;

(c) Maintenance and repair were below accepted standards so as to cause significant deterioration of housing services;

(d) Other expenses were unreasonably high or low notwithstanding prudent business practice.

(ii) The rent on the base date was disproportionately low due to the fact that it was not established in an arms-length transaction or other peculiar circumstances.

h. Fair net operating income. The board shall permit rent increases in rent such that the landlord's net operating income shall be increased by sixty percent of the percentage increase in the Consumer Price Index over the base year. (For example, if the CPI has increased by ten percent since the base year, the landlord shall be entitled to a net operating income which is six percent above the base year level.) Unless the board selects a base period other than the year 1985, the base year CPI shall be the CPI for June 1, 1985. For the purposes of this section, the current CPI shall be the CPI last reported as of the date of the application. A rent increase granted pursuant to this section shall not exceed the increase requested in the application.

B. Substantive grounds for rent adjustment applied for by homeowners/residents.

1. Grounds for application. A homeowner/resident or group of homeowners/residents may file a rent adjustment application for one or more rental spaces in the same rental complex on the ground that:

a. There has been a discontinuance or substantial reduction of housing service to homeowners/residents without a corresponding reduction in rent.

b. The landlord has accepted and retained rent in excess of that permitted by this chapter. (Ord. 607, 1995: Ord. 494 § 6, 1987)

9.70.062 Rental adjustment allowed for capital improvement, procedure for granting.

The rental appeals board is authorized to establish rules and regulations defining a capital improvement, determining the amortization period allowed for the recovery of the capital improvement, determining a reasonable rate of return on the capital improvement, determining the impact of a capital improvement on rent once the cost of the capital improvement has been fully recovered, and any other factor or criteria relevant to such determinations. (Ord. 599 § 2, 1994)

9.70.070 Individual rent adjustment hearings.

A. Petitions. No such individual rent adjustment shall be granted until after the consideration of the petition at an individual rent adjustment hearing. The board may delegate its powers to hold such hearings or to rule on such petitions, or both, to staff hearing examiners or panels of board members, and the board may reserve to itself the power to hear appeals of the decisions and orders of hearing officers or board panels. Final decisions on such petitions and appeals must be made within reasonable deadlines established by the board.

B. Notice. The board shall notify the landlord, if the petition was filed by the homeowner/resident; or the homeowner/resident, if the petition was filed by the landlord, of the receipt of such a petition. The board shall notify both

parties as to the time, date and place of the hearing. Hearings shall be scheduled for times most convenient for all parties, including evenings and weekends. Hearings may be postponed or continued for good cause, provided that all parties receive timely notice of such action.

C. Records. The board may require either party to a rent and adjustment hearing to provide it with all pertinent books, records and papers. Such documents shall be made available to the parties involved prior to the hearing at the office of the rent appeals board. The board shall conduct a building inspection and/or request the city to conduct an inspection if the board and/or hearing examiner find good cause to believe the board's current information does not reflect the current condition of the controlled rental space. The homeowner/resident may request the board or hearing examiner to order such an inspection prior to the date of the hearing. All documents required under this section shall be made available to the parties involved prior to the hearing at the office of the rent appeals board. In cases where information filed in a petition for rent ceiling adjustment, or in additional submissions filed at the request of the board and/or hearing examiners, is adequate or false, no action shall be taken in the petition until the deficiency is remedied.

D. Open hearings. All rent ceiling adjustment hearings shall be open to the public.

E. Right of assistance. All parties to a hearing may have assistance in presenting evidence and developing their position from attorneys, legal workers, homeowner/resident union representatives, or any other persons designated by such parties.

F. Hearing record. The board shall make available for inspection a copy of the official record, which shall constitute the exclusive record for the decision on issues at the hearing.

The record of the hearing, or any part of one, shall be obtainable for the cost of copying. The record of the hearing shall include:

1. All exhibits, papers and documents required to be filed or accepted into evidence during the proceeding;

2. A list of participants present;

3. A summary of all testimony accepted in the proceedings;

4. A statement of all materials officially noticed;

5. All findings of fact;

6. The ruling on each exception or objection, if they are presented;

7. All recommended decisions, orders or rulings;

8. All final decisions and/or orders of hearing examiners and/or panels of board members and/or the board; and

9. Each final decision, order or ruling.

G. Hearing decision. No individual rent adjustment shall be granted unless supported by the preponderance of the evidence submitted at the hearing. All parties to a hearing shall be sent a notice of the decision and a copy of the findings of fact and law upon which the decision is based. At the same time, parties to the proceedings shall also be notified of their rights to an administrative appeal, if allowed by the board, and to judicial review of the decision pursuant to section 9.70.100 of this chapter.

H. Consolidation.

I. Inadequate or false information. If information filed in a petition for an individual rent adjustment or any additional submissions filed at the request of the board is inadequate or false, no action shall be taken on the petition until the deficiency is remedied. (Ord. 607, 1995: Ord. 494 § 7, 1987)

9.70.080 Just cause for eviction.

Shall apply to mobile home park evictions which are governed by Section 798-796.6 of the California Civil Code. (Ord. 494 § 8, 1987)

9.70.090 Non-waiverability.

Any provision, whether oral or written in or pertaining to a rental agreement whereby any provision of this chapter for the benefit of a homeowner/resident is waived, shall be deemed against public policy and void. (Ord. 607, 1995: Ord. 494 § 9, 1987)

9.70.100 Judicial review.

A landlord or homeowner/resident aggrieved by any action, regulation, rule, order or decision of the board may seek judicial review by appealing to the appropriate court within which the rent-controlled space is located. (Ord. 607, 1995: Ord. 494 § 10, 1987)

9.70.110 Civil remedies.

Any landlord who demands, receives, accepts or retains any payment of rent in excess of the maximum lawful rent, in violation of the provisions of this chapter or any rule, regulation or order hereunder promulgated, shall be liable as hereinafter

provided to the homeowner/resident from whom such excessive payment is demanded, accepted, received or retained, for reasonable attorney's fees and costs, as determined by the court, plus damages in an amount not to exceed five hundred dollars or three times the amount by which the payment or payments demanded, accepted, received or retained exceeds the maximum lawful rent, or whichever is greater. (Ord. 607, 1995: Ord. 494 § 11, 1987)

9.70.120 Injunctive relief.

The board and homeowners/residents and landlords of rent controlled spaces may seek relief from the appropriate court within the jurisdiction within which the rent controlled space is located, to restrain by injunction any violation of this chapter and of the rules, regulations, orders and decisions of the board. (Ord. 607, 1995: Ord. 494 § 12, 1987)

9.70.130 Partial invalidity.

If any provision of this chapter or application thereof is held invalid or unconstitutional, this invalidity or unconstitutionality shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared to be severable. This chapter shall be liberally construed to achieve its purposes and preserve its validity. (Ord. 612 § 2, 1996: Ord. 494 § 13, 1987)

9.70.132 Amendment.

The provisions of this measure may be amended by the city council after a public hearing before the rent appeals board and by four-fifths vote of the city council. (Measure L, passed by voters at election of November 8, 1994 and Resolution 94-189 adopted December 6, 1994 ratified the citizens' votes)

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9.70.150 Retaliation.

The park owner/management shall in no way retaliate against any homeowner/resident for the homeowner/resident's assertion or exercise of any right under this chapter. In the event of retaliatory action by the park owner/management, the homeowner/resident is referred to state law and homeowner/resident rights existing under state law. (Ord. 612 § 2, 1996)

(2)

No. 06-510

FILED

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

HILLSBORO PROPERTIES, and
PAUL GOLDSTONE ENTERPRISES, INC.
dba RANCHO GRANDE MOBILEHOME PARK,

Petitioners,

v.

CITY OF ROHNERT PARK, a municipal corporation, and
CITY OF ROHNERT PARK RENT APPEALS BOARD,

Respondents.

On Petition For Writ Of Certiorari
To California Court Of Appeal,
First Appellate District, Division Three

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Hillsboro Properties and Paul Goldstone Enterprises, Inc. dba Rancho Grande Mobilehome Park ("Hillsboro") argue that U.S. Supreme Court review of this mobile home rent control dispute is warranted because Hillsboro has been unable to obtain damages for a regulatory taking in state court. In a twisted effort to substantiate U.S. Supreme Court review in this case, Hillsboro makes two arguments for the first time in this Court: 1) that California state courts are in "willful non-compliance with the mandate of *First English*," and 2) that the United States Supreme Court should rule on Hillsboro's taking claim directly, as a matter of federal law.

There are two glaring errors in this request for Supreme Court review. First, Hillsboro failed to raise any of these arguments to any of the courts below. Second, Hillsboro's arguments substantively have no merit. The Court of Appeal's opinion not only followed well-settled principle, but also complied with all mandates of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). Moreover, U.S. Supreme Court precedent is clear that Hillsboro has no constitutional right to have its regulatory taking claim reviewed in the first instance by this Court.

This dispute involves the City of Rohnert Park's ("City's") mobile home rent control ordinance ("Ordinance"), which was adopted in 1987 and limited the amount by which a landlord of a mobile home park could raise rents. (Petition, Appendix ("Pet. App.") F at p. F-2.) Although the Ordinance did control rental adjustments in mobile home parks, it provided for an annual automatic adjustment tracking the Consumer Price Index. (Pet. App.

A at p. A-7.) It also included a procedure to apply for "net operating income" increase. (Pet. App. A at p. A-7.) The Ordinance explicitly stated that the "net operating income procedure" existed "in order to provide a just and reasonable return." (Pet. App. A. at p. A-7.)

In 1993, park owners challenged the Ordinance on the grounds that it did not permit park owners to earn a reasonable rate of return on the cost of capital improvements. (Pet. App. E at p. E-2.) The federal court found the Ordinance to be unconstitutional because it violated substantive due process by preventing mobile home park owners from collecting any profit on new capital improvements. (Pet. App. E at p. E-2.) On January 24, 1995, prior to the formal entry of judgment, the City adopted Ordinance No. 599, which amended the Ordinance, to add a "capital improvement pass-through" provision.[1] (Pet. App. E at p. E-2.)

In 2000, Hillsboro filed a second action in federal court seeking a declaration that the City was wrongfully enforcing the Ordinance, as amended. (Pet. App. A at p. A-6.) In December 2002, the federal court ruled that the 1995 amendments had corrected the constitutional defect in the Ordinance and entered judgment in the City's favor. (Pet. App. A at p. A-6.)

In August 2003, Hillsboro unsuccessfully attempted to apply to the rent board for a "*Kavanau* adjustment" rather

[1] At the conclusion of the 1995 litigation, the tenants and the City voluntarily stipulated to a limited duration rent increase to cover the cost of capital improvements made by Hillsboro. (Pet. App. A at p. A-16, Pet. App. D at p. D-6.) Hillsboro does not claim that it has made any capital improvements since that time that would have warranted a capital improvement pass-through. (Pet. App. A at p. A-16.)

than following the procedures set forth in the Rules and Regulations of the Rent Appeals Board. (Pet. App. A at p. A-6.) The City Attorney did not accept the application and directed Hillsboro to the procedures outlined in the applicable Rules and Regulations. (Pet. App. A at pp. A-6, A-8.)

In September 2004, Hillsboro filed suit in the Superior Court for, among other things, inverse condemnation, a declaration that the ordinance had effected an unconstitutional taking, and a writ of mandate ordering the rent board to consider the application. (Pet. App. A at p. A-8.) In this action, Hillsboro sought to recover, either from its tenants or from the City, rents in excess of the rent control ceiling for the period during which the Ordinance, subsequently held to be unconstitutional, was in force: January 16, 1988 – January 24, 1995.[2] (Pet. App. A at p. A-6.) Rather than alleging that Hillsboro had made any capital improvements for which it was entitled to compensation, Hillsboro's complaint challenged the Ordinance's rent ceiling in general. (Pet. App. A at p. A-16.)

The trial court sustained the City's demurrer to the complaint without leave to amend, dismissing the first four causes of action as time-barred and ruling that the remaining six causes of action failed to state a cause of action. (Pet. App. A at p. A-8.) On April 6, 2006, the Court of Appeal affirmed the trial court's judgment stating "[t]o

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[2] Any challenge to the City's actions are also time barred. Hillsboro's claim accrued at the latest in 1995. More than eighteen years have elapsed since the Ordinance was adopted and more than eleven years since its amendment by Ordinance No. 599. The longest statute of limitations for any type of inverse condemnation claim is five years. *Travis v. County of Santa Cruz*, 33 Cal.4th 757, 775 (2004). Hillsboro's challenge to the Ordinance is too late by any measure.

the extent that Hillsboro is challenging the City's refusal to authorize a "*Kavanau* adjustment," its claim fails because it does not allege the facts necessary to establish its right to such an adjustment, namely that enforcement of the ordinance has deprived it of a fair and reasonable rate of return on its investment." (Pet. App. A at pp. A-16, A-17.) Hillsboro elected not to request rehearing from the appellate court but instead petitioned the California Supreme Court for review.[3] On July 12, 2006, the California Supreme Court denied review.

On October 9, 2006, Hillsboro filed its Petition for Writ of Certiorari with this Court.

REASONS FOR DENYING REVIEW

I. THE QUESTIONS PRESENTED BY HILLSBORO REGARDING CALIFORNIA STATE COURTS' NONCOMPLIANCE WITH *FIRST ENGLISH* DOCTRINE AND HILLSBORO'S ENTITLEMENT TO DIRECT U.S. SUPREME COURT ADJUDICATION OF ITS TAKING CLAIM DO NOT WARRANT REVIEW BY THIS COURT.

For the first time in this Petition, Hillsboro argues that 1) California courts are in willful noncompliance with *First English* mandates because they have effectively reimplemented *Agins v. City of Tiburon*, 24 Cal.3d 266

[3] Because Hillsboro failed to request rehearing, the statement of the facts and issues posed by the Court of Appeal should be accepted as true for purposes of Hillsboro's Petition. *Hernandez v. New York*, 500 U.S. 352, 366 (1991); Cal. Rule of Court, Rule 28(c)(2).

(1979)[4] by deciding and following *Kavanau v. Santa Monica Rent Control Board*, 16 Cal.4th 761 (1997), and 2) as Hillsboro is barred from litigating its claim in federal district court by this Court's recent decision in *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2005), its claim is ripe for adjudication directly by the U.S. Supreme Court. (Petition, p. i, 11, 13) This case presents a poor vehicle for resolving these issues both because the issues were not raised below and also because these issues raise no viable federal question.

A. Neither the Decision Below Nor the Record Raises the Questions Presented by Hillsboro Regarding State Courts' Noncompliance with *First English* or Adjudication of Hillsboro's Taking Claim Directly in the United States Supreme Court.

United States Supreme Court Rule 14 provides that a petition for review of a state court judgment must specify the following:

> The stage in the proceedings, both in the court of first instance and in the appellate courts when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof,

[4] Under *Agins* a takings plaintiff in California was not entitled to just compensation for the period during which the regulation in question was enforced. *Agins v. City of Tiburon*, 589 P.2d at 31.

> with specific reference to the places in the record where the matter appears.
>
> (S. Ct. R. 14(g)(i).)

This Court has imposed those requirements "so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." *Id.*

Hillsboro does not, nor can it, provide this Court with any of the information required by Rule 14 because Hillsboro raises these two new questions for the first time in its petition to this Court. Hillsboro never raised any of these arguments at the trial or appellate court levels or in its petition for certiorari to the California Supreme Court. Had Hillsboro done so, those courts would have had an opportunity to analyze Hillsboro's arguments in light of its takings claim.

When a petition raises questions which were not decided by the court below because they were not raised in that forum, any such defect is ordinarily fatal to the petition. Robert L. Stern et al., Supreme Court Practice 459-460 (8th ed. 2002). Hillsboro's petition for review by this Court should be denied, because the courts that considered the case below were never given the opportunity to review or analyze these arguments.

B. Even If Properly Raised, Hillsboro's Argument That California State Courts Are In Noncompliance With The Mandates Of *First English* Is Without Merit.

Hillsboro argues that California state courts, including the Court of Appeal in this case, by following *Kavanau*

v. Santa Monica Rent Control Board, have "carved out a special category of regulatory takings for which the California courts offer no remedy at all." (Pet. p. 12-13.) According to Hillsboro, this runs afoul of the mandates of *First English*. This misstates the law.

Kavanau merely states that a landlord's " . . . continuing right to an adjustment of future rents *can provide an adequate remedy* [emphasis added]." *Kavanau v. Santa Monica Rent Control Board*, 16 Cal.4th at p. 783. *Kavanau* did not decide what alternative remedy might be appropriate if a landlord shows that the remedy of future rent adjustments is for some reason unavailable or inadequate. *Id.* at p. 785. A landlord retains the ability to file an inverse condemnation claim in the event that a *Kavanau* adjustment is inadequate. *Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 825, 828 (2004); *Galland v. City of Clovis*, 24 Cal.4th 1003, 1025 (2001).

Hillsboro continues this line of argument, stating that " . . . California provides no remedy of any kind for regulatory takings of the sort Hillsboro has suffered." (Petition, p. 14.) Yet Hillsboro has not demonstrated that it suffered a "taking." Hillsboro appears to argue that inverse condemnation should be available in the absence of any "constitutional injury." This is simply not the law. Both state and federal courts require the demonstration of a "constitutional injury" in order to obtain "just compensation" for that injury. *Tahoe Sierra Preservation Council v. Tahoe Reg. Pl. Ag.*, 535 U.S. 302, 328 (2002) (holding that under this Court's *First English* decision a state must provide a remedy only where taking has been established.) In short, in line with federal case law, California courts do provide an inverse condemnation remedy – but only in the

event that a landlord demonstrates that he or she has suffered a constitutional injury.

This Court has consistently affirmed that states have broad power to regulate the landlord-tenant relationship without paying just compensation for all economic injuries resulting from the regulation. *Yee v. City of Escondido*, 503 U.S. 519, 528-529 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982); *Bowles v. Willingham*, 321 U.S. 503, 517-518 (1944) (rent control); *Block v. Hirsh*, 256 U.S. 135, 157 (1921). The government may place ceilings on the rents a landowner can charge. *Yee v. City of Escondido*, 503 U.S. at 529. This type of non-possessory regulation is generally not recognized as a taking unless it "goes too far," and unjustly requires the landlord to pay for a public benefit which ought to be compensated by the government. *Yee v. City of Escondido*, 503 U.S. at 531; *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

This Court has determined that a rent control ordinance goes too far when it deprives the landlord of a fair and reasonable return on investment. *Federal Communications Commission v. Florida Power Corp.*, 480 U.S. 245, 253 (1987) (maximum rate may stringently limit the return on investment so long as rates are not confiscatory) ("*Florida Power*"); *Pennell v. City of San Jose*, 485 U.S. 1, 9 (1988) (discussing, but not deciding, whether a rent control ordinance reduced rates below an objectively reasonable amount); *Pennell v. City of San Jose*, 485 U.S. at 20-21 (Scalia, J., concurring).[5] In *Florida Power*, this Court held

[5] Concurring in *Pennell*, Justice Scalia argued that under the Takings Clause a rent control ordinance which permits "reasonable rents" does not constitute a taking. *Pennell v. City of San Jose*, 485 U.S.

(Continued on following page)

that there is no Fifth Amendment taking of property where the rate was reasonable and not confiscatory.[6] *Federal Communications Commission v. Florida Power Corp.*, 480 U.S. at 253.

As the foregoing demonstrates, California courts, including the Court of Appeal in this case, are in compliance with both the state and federal Constitutions, as well as the mandates of *First English*. Despite Hillsboro's strong desire to the contrary, state and federal precedent make clear that in the context of rent regulation, a taking cannot exist absent the denial of a fair return. Hillsboro cannot establish this necessary prerequisite to stating a takings claim. As a consequence, the Court of Appeal in this case correctly followed both state and federal precedent in holding that Hillsboro could make no claim for a regulatory taking.

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at 20-21 (Scalia, J., concurring). He reasoned that where the landlord receives a reasonable return the landlord does not disproportionately bear a public burden because the landlord is in part responsible for the housing conditions which necessitated rent regulation. *Id.* at 20. However, where the rent is reasonable the landlord is no longer responsible for the housing conditions. *Id.* at 21. Thus, any reduction below a reasonable return constitutes a taking for which compensation must be paid. *Id.* at 23-24.

[6] In *Florida Power*, the FCC was empowered to regulate the rates under which cable company tenants leased space on utility poles under certain circumstances. *Federal Communications Commission v. Florida Power Corp.*, 480 U.S. at 248. This Court found the rate was reasonable because the regulation provided that rates should permit the utility to recover its fully allocated costs. *Id.* at 254. On this basis, the court rejected the argument that the regulation amounted to a non-possessory taking without just compensation. *Id.*

C. Even If Properly Raised, Hillsboro's Argument That This Court's Decision In *San Remo* Renders This Dispute Eligible For Direct Review By The United States Supreme Court Is Without Merit.

Hillsboro reads the *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) and *San Remo* decisions together to conclude that its petition is entitled to review by this Court. Hillsboro argues that its case is ripe for federal review under *Williamson County* and then points out that, under *San Remo*, it is precluded from relitigating in federal court issues that were previously litigated in state court. (Pet. p. 14.) Hillsboro somehow extrapolates from these decisions that it is entitled to review by this Court. (Pet. p. 15.) Neither *Williamson County* nor *San Remo* support this view.

It is well settled that there is no constitutional right to vindicate federal takings claims in federal court. *San Remo*, 545 U.S. at 331; *Allen v. McCurry*, 449 U.S. 90, 103-104 (1980). This Court's decision in *San Remo* did not create a special entitlement to Supreme Court review for regulatory takings plaintiffs like Hillsboro. *San Remo* simply held that, under 28 U.S.C. § 1738, a takings plaintiff is not entitled to relitigate issues in federal court which were already decided in state court. *San Remo*, 545 U.S. at 338, 348. The Court reasoned that "it is entirely unclear why [petitioner's] preference for a federal forum should matter for constitutional or statutory purposes." *Id.* at 334. The Court went on to state that there was little precedent for federal litigation of claims that a state has taken property in violation of the Fifth Amendment and

that state courts are fully competent, if not more experienced, in hearing such claims. *Id.* at 346.

Hillsboro now attempts to push the argument rejected by this Court in *San Remo* one step further. Hillsboro argues that this Court should rule on its federal taking claims directly because "access to the lower federal courts is barred by *San Remo*."[7] (Pet. p. 8.) *San Remo* does not support that proposition. Contrary to Hillsboro's assertions, this Court clearly stated that a plaintiff claiming a regulatory taking has no special right to have federal takings claims decided in any federal court. *San Remo*, 545 U.S. at 342. "This is so even when the plaintiff would have preferred not to litigate in state court, but was required to do so by statute or prudential rules." *Id.; see also Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 477 (1982). Notably, in *San Remo* the Court affirmed dismissal of the petitioner's federal takings claims without reaching the merits. *Id.* at 347-348. The simple fact that Hillsboro's claim will ultimately be decided by a state court does not entitle Hillsboro to review by this Court. As contemplated in *San Remo*, California courts have competently adjudicated Hillsboro's federal claims in accordance with this Court's takings jurisprudence. *See id.* at 346-47. Hillsboro

[7] Hillsboro supports its argument by claiming that in *San Remo* this Court suggested that the petitioner should have sought compensation by way of a writ of certiorari to this Court. (Pet. at p. 15 citing *San Remo*, 545 U.S. at 334.) This is patently false. In laying out the procedural history of the case, the Court in *San Remo* simply notes that the petitioners returned to federal district court upon rejection of their claims by the California Supreme Court rather than seeking a writ of certiorari. *Id.* The Court's analysis attaches absolutely no significance to this procedural fact.

has had its day in court and its Petition for Writ of Certiorari does not warrant further review.

II. THE DECISION OF THE CALIFORNIA COURT OF APPEAL WAS CORRECT.

Hillsboro's challenge to the Court of Appeal decision is simple: Hillsboro disagrees with the well-established principle that rate regulation is judged to be a taking only when its effect has been actually confiscatory.[8] *Kavanau*, 16 Cal.4th at 771; *Jersey Cent. Power & Light Co. v. F.E.R.C.* 810 F.2d 1168, 1181, fn.3 (D.C. Cir. 1987). Hillsboro is incorrect. There is no "taking" absent denial of a fair return. Both the Court of Appeal in this case and federal precedent make clear that in the context of price regulation, no constitutional injury reaching the level of a "taking" is established unless the property owner demonstrates the denial of a "fair return" on its investment. (Pet. App. A at p. A-14) *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308, 310 (1989) (holding that the U.S. Constitution protects against price limits that are so unjust as to be confiscatory); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 53 (1936) (holding that so long as the rates set are not confiscatory, the Fifth Amendment does not bar their imposition).

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[8] Hillsboro states that the Court of Appeal "did not dispute that Hillsboro had suffered significant economic injury because of the City's violation of Hillsboro's civil rights." (Pet. p. 7.) This is a patently false misstatement of the decision below. The Court of Appeal never considered the question of whether Hillsboro had suffered economic injury because Hillsboro never stated that it had suffered economic injury. In fact, the Court of Appeal ruled that the decision might have been different had Hillsboro done so. (Pet. App. A p. A-18.)

As the Court of Appeal succinctly explained:

> Hillsboro's argument proceeds on the unarticulated premise that a property owner has the constitutionally protected right to charge as much as he or she wants for the use of property, so that enforcement of an invalid rent ceiling deprives it of a constitutionally protected right. That is not what the federal or state Constitutions, or *Kavanau*, *Galland* or any other case, protect.

(Pet. App. A, p. A-13.)

Denial of a fair return is the sine qua non for relief under the state and federal Constitutions. As the Court of Appeal correctly pointed out, Hillsboro has not demonstrated the requisite denial of a "fair return." (Pet. App. A p. A-15.) Rather than demonstrating that it has been denied a fair return, Hillsboro argues it suffered a taking because it was not able to impose noticed rent increases that exceeded the increases permitted under the Ordinance. (Pet. p. 6.) Hillsboro's position is based on a faulty premise. Hillsboro has not suffered a constitutional injury simply because it was affected by the application of an ordinance which was found to be defective. Regardless of the validity of the Ordinance, Hillsboro is not entitled to compensation unless it can establish the Ordinance deprived it of a constitutionally protected right.[9] In the

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[9] See for example, *Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) [even if regulation authorized use of constitutionally excessive force, no cause of action under 42 U.S.C. § 1983, absent constitutional injury arising from actual use of such force]; *Carey v. Piphus*, 435 U.S. 247, 253-254 (1978) [recovery of substantial damages under 42 U.S.C. § 1983 requires proof not only of violation of constitutional right but that plaintiff's injury was caused by deprivation of constitutional right];

(Continued on following page)

context of rent control, a taking arises only where the landlord is denied a fair and reasonable return. *Florida Power*, 480 U.S. at 253; *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308, 310 (1989); *Jersey Cent. Power & Light Co. v. F.E.R.C.* 810 F.2d at 1181, fn.3. A property owner has no constitutional right to charge excessive rents. *Pennell*, 485 U.S. at 20-21 (Scalia, J., concurring). Absent a demonstration that it has been denied a fair return, Hillsboro does not have a constitutional right to impose unregulated rent increases.

Hillsboro's takings claim is fatally flawed because it omits this crucial element of a takings claim – a demonstration that the Ordinance has deprived Hillsboro of a "fair return." Accordingly, the Court of Appeal's decision was correct as it comports with long established state and federal precedent including *First English*.

III. THE ISSUES PRESENTED BY HILLSBORO DO NOT WARRANT REVIEW UNDER RULE 10 OF THE SUPREME COURT RULES.

Hillsboro's Petition does not warrant Supreme Court review. Review on a writ for certiorari is granted only for

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Utah Animal Rights Coalition v. Salt Lake City Corp., 371 F.3d 1248, 1260-1261 (10th Cir. 2004) [demonstrators not entitled to damages for delay in issuing permit even though ordinance governing issuance of permits was later declared to be unconstitutional]; *Diesel v. Town of Lewisboro*, 232 F.3d 92, 103-104 (2d Cir. 2000) [no "cognizable constitutional injury" from denial of preferential police treatment, even if selective enforcement of law was based on constitutionally impermissible consideration]; *Reyes v. City of Lynchberg*, 300 F.3d 449, 455-457 (4th Cir. 2002) [no per se cause of action under 42 U.S.C. § 1983 for prosecution under ordinance later held to be unconstitutional]; *Richardson v. City of South Euclid*, 904 F.2d 1050, 1053-1055 (6th Cir. 1990), cert. denied, 498 U.S. 1032 (1991) [same].)

compelling reasons. S. Ct. R. 10. Supreme Court Rule 10 sets out the considerations guiding the Court's decision on whether to grant certiorari. When reviewing state court decisions, the Court considers whether:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or a United States court of appeals;
>
> (c) a state court or United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> S. Ct. R. 10.

Rule 10 considers whether the subject decision is made by the state court of last resort. Thus, the rule suggests that decisions by state intermediate appellate courts are less important. There are good reasons for this view. First, a decision by a state intermediate appellate court is less likely to be considered outside of its jurisdiction. Second, the decision of the intermediate appellate court can be corrected later by the state court of last resort. Here, the California Court of Appeal rendered the decision subject to this petition. It is not the court of last resort. California's court of last resort, the California Supreme Court, denied review of this case.

Even assuming the decision was rendered by a California court of last resort, none of Rule 10's considerations are met by Hillsboro's petition. Hillsboro has not asserted that the state court decision conflicts with the decision of another state court of last resort or United States Court of

Appeals. Although Hillsboro alleges that the Court of Appeal decision violates *First English's* mandate that just compensation be available if a taking is shown, this characterization of the Court of Appeals' decision is incorrect. Hillsboro neglects to mention that it utterly failed to demonstrate a "taking" had occurred to either the trial court or the Court of Appeal. This Petition is, quite simply, an effort to obtain United States Supreme Court review of a decision which follows clear federal law on regulatory takings. Hillsboro's tortured attempt to characterize this decision as an improper denial of any and all remedies for an alleged taking finds no support in the facts or caselaw. Hillsboro cannot establish that it was in fact denied a fair return by the City's application of its Ordinance. As a result, Hillsboro has failed to justify this Court's review.

CONCLUSION

This is a simple case of faulty pleading and of a record that fails to sustain any claim for a regulatory taking. Neither the decision below nor the record raises the Questions Presented regarding California state courts' willful noncompliance with federal precedent or entitlement to direct review of Hillsboro's regulatory taking claim by the U.S. Supreme Court. Even if Hillsboro's petition were not denied on these procedural grounds, it should be denied on substantive grounds. Both the trial court and Court of Appeal in this case applied well-settled law to undisputed facts and found that Hillsboro could state no claim due to its failure to allege any sort of denial of a fair rate of return on its investment. Moreover, there is no legal support for Hillsboro's contention that under *San Remo* its case should be deemed ripe for U.S. Supreme

Court review. Finally, as Hillsboro is unable to cite any grounds for review pursuant to Rule 10, this Court should deny Hillsboro's Petition.

DATED: November 10, 2006

Respectfully submitted,

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(3)

No. 06-510

FILED
NOV 22 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the

Supreme Court of the United States

HILLSBORO PROPERTIES, and
PAUL GOLDSTONE ENTERPRISES, INC.
dba RANCHO GRANDE MOBILEHOME PARK,

Petitioners,

v.

CITY OF ROHNERT PARK, a
municipal corporation, and
CITY OF ROHNERT PARK RENT APPEALS BOARD,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal for the First Appellate District, Division Three

PETITIONERS' REPLY BRIEF

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Petitioners Hillsboro Properties and Paul Goldstone Enterprises, Inc.[1] (Hillsboro), hereby reply to the Brief in Opposition to Petition for Writ of Certiorari (Opp.) filed by Respondents City of Rohnert Park, et al. (City), on November 13, 2006. The Petition for Writ of Certiorari (Pet.) in this case asks this Court to enforce the mandate of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), which requires all states to provide a certain and adequate remedy of just compensation for violations of the Takings Clause of the Fifth Amendment. Hillsboro also asks this Court, pursuant to its recent decision in *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323, 125 S. Ct. 2491 (2005), to exercise direct review of Hillsboro's federal takings claim, for which no remedy at all exists in the California courts under the decision below.

I

THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE PROPERLY RAISED IN THE APPELLATE COURT

In compliance with Rule 14 of this Court, Hillsboro's Petition specifies that "[t]he question of whether Hillsboro was entitled to just compensation under the Fifth Amendment was argued and decided by the California Court of Appeal," with appropriate references to the Appendix. Pet. at 7. As was fully set forth in the Petition, the court below answered this question in the negative, thereby creating the need for this Court to resolve the specific Questions Presented in the Petition:

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[1] Paul Goldstone Enterprises, Inc., is a closely held corporation with no parent corporation and no publicly held company owning 10% or more of its stock.

Q1. Under *First English*, when a property owner has obtained a judicial determination that a rent control law is unconstitutional, may the City that administers that law avoid paying just compensation for the temporary abridgment of an owner's contractual right to collect lawfully noticed rents over the seven years in which the unconstitutional regulations were in effect?

This question seeks review of the ultimate issue presented to the lower court for adjudication. Given that Respondents vigorously disputed this question at every step of briefing and oral argument,[2] and the court below directly decided this question in that part of its opinion previously identified by Hillsboro (App. A-3 - A-4), it is not clear why Respondents would represent to this Court that this is a "new" question raised "for the first time in [Hillsboro's] petition to this Court." Opp. at 6. Suffice it to say, the record demonstrates that Respondents are mistaken.

Q2. Since Petitioners' regulatory takings claim is now ripe for federal adjudication, but Petitioners are barred from litigating their claim in federal district court by this Court's recent decision in *San Remo Hotel v. City and County of San Francisco*, should this Court directly rule on Petitioners' regulatory takings claim as a matter of federal law?

Obviously, this question could not have been presented to the court below in these terms, since it seeks a remedy newly specified by *this* Court in *San Remo*, to provide vindication of

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[2] *See, e.g.*, Respondents' Brief, California Court of Appeal Case No. A110441, at 8-11, 15-19; Answer to Petition for Review, California Supreme Court Case No. S143408, at 3-6.

federal constitutional rights that are not recognized or protected by the state courts of California. The decision below, denying Hillsboro a remedy for the City's *ultra vires* nullification of its contractual rights, was the triggering event that ripened Hillsboro's Fifth Amendment takings claim for federal adjudication. *See Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985). By (wrongly) deciding the question of "whether Hillsboro was entitled to just compensation under the Fifth Amendment," Pet. at 7, the court below directly created the need for this Court to resolve the second Question Presented.

II

THE COURT BELOW DETERMINED THAT NO REMEDY IS AVAILABLE IN CALIFORNIA FOR THE TAKING OF HILLSBORO'S PROPERTY, *NOT* THAT NO TAKING OCCURRED

A. The Court Below Avoided Reaching the Merits of Petitioners' Takings Claim by Limiting the Availability of a *Kavanau* Remedy to Cases Alleging Denial of a "Fair Return" Under a Lawful Rent Control Regime

The court below ruled that there is no remedy in California for Fifth Amendment takings in the context of residential rental property, unless the property owner alleges that he has been denied a "fair return" on that property. Thus, in the case at bar, the court upheld the City's confiscation of Hillsboro's contractual right to receive voluntarily agreed-upon rents, *even though the City had no lawful rent control regulation in place* over the relevant time period.

The Opposition Brief mischaracterizes the proceeding below as one in which "Hillsboro has not demonstrated that it suffered a taking." Opp. at 7. However, the facts establishing the taking are undisputed. Hillsboro was unlawfully prevented

from receiving contractually agreed-upon rents over a seven-year period by a regulatory scheme which was found, in the final decision of a federal court, to have been unconstitutional from its exception. Pet. at 6. Hillsboro's economic injury from the City's unconstitutional actions is fixed and certain, measured by the dollar amount of contractual revenues Hillsboro was illegally forced to forgo.[3] *Id.* Nothing remains to be adjudicated except the issuance of an order to the City to provide just compensation for the taking, as required by *First English.*

The court below chose to evade this responsibility by the simple expedient of ruling that *no remedy exists*, under California law, for the sort of taking Hillsboro has suffered. The California Supreme Court has established that the only remedy available in that state for regulatory takings effected in the context of residential rent control is a "*Kavanau* adjustment," increasing prospective rents to approximate the amount of compensation due. *See Kavanau v. Santa Monica Rent Control Board,* 941 P.2d 851, 865 (Cal. 1997). The court below extended that doctrine, ruling that the remedy of a *Kavanau* adjustment is available only in cases alleging denial of a "fair return." App. A-14. The City does not shrink from the implications of this doctrine: "State and federal precedent make clear that in the context of rent regulation, *a taking cannot exist absent the denial of a fair return.*" Opp. at 9 (emphasis

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[3] The City misstates the record again with its inexplicable assertion that "Hillsboro never stated that it had suffered economic injury." Opp at 12 n.8. This was, of course, the gravamen of Hillsboro's complaint, that was vigorously contested throughout the state court litigation – the loss of Hillsboro's contractual rights to receive contractually specified, freely agreed-upon rents in the absence of a lawful rent control ordinance. *See, e.g.*, Complaint at 8, ¶ 28: "Hillsboro has no effective remedy for the payment of damages that accrued between 1988 and 1995 when Ordinance 494 was wrongfully enforced by the city."

added). Under this reasoning, since a "fair return" under rent control is a term of art that has no meaning whatsoever outside the context of a specific, legally enforceable rent control law, *see* Pet. at 7 n.1, the City is free to confiscate anything it pleases from the owners of residential rental property during the period when no such legally enforceable law was in effect. If there is no remedy, the City reasons, there can be no taking. Q.E.D.

B. The Availability of an Inverse Condemnation Remedy Was Foreclosed by the Decision Below

The City consistently represents to this Court that plaintiffs in Hillsboro's position can obtain an inverse condemnation remedy in the California courts. *See* Opp. at 7 ("California courts do provide an inverse condemnation remedy"; "A landlord retains the ability to file an inverse condemnation claim in the event that a Kavanau adjustment is inadequate."). This is a remarkable assertion, given that inverse condemnation was specified as a cause of action in Hillsboro's complaint, App. A-10, and the decision below categorically foreclosed the availability of such an option in the state courts, App. A-13. And of course, as the City happily notes, *Hillsboro* now is also barred from pursuing an inverse condemnation claim in federal district court by *San Remo*. The truth is clear: no inverse condemnation remedy is available to Hillsboro anywhere, in any court, with the possible exception of this Court.

To reiterate, Hillsboro did not seek a "*Kavanau* adjustment" from the City because this was Hillsboro's preferred remedy. Rather, the California Supreme Court in *Kavanau* (and in *Galland v. City of Clovis*, 16 P.3d 130 (Cal. 2001)) had mandated that such an adjustment is the ***sole*** remedy available for a taking in the context of residential rental property. *See* Pet. at 11-12. When the City refused to process Hillsboro's application for a *Kavanau* adjustment, Hillsboro sued for inverse condemnation as an alternative remedy, relying

on the very passages in *Kavanau* and *Galland* the City now cites to this Court. App. A-2, A-8.

The court below, by restricting the availability of a *Kavanau* remedy to cases alleging denial of a "fair return," foreclosed ***both*** prospective rent increases ***and*** inverse condemnation as remedies for plaintiffs like Hillsboro, whose property is confiscated by operation of illegal rent restrictions having no relationship to a "fair" or "unfair" rate of return on rental property.

III

ONLY THIS COURT CAN DETERMINE THE MEANING OF *SAN REMO*, AND IT SHOULD DO SO IN THIS CASE

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), this Court determined that violations of the Takings Clause may not be adjudicated in federal court *until* just compensation has been sought and denied in state court. *Id.* at 194-97. In *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323, 125 S. Ct. 2491, it was further established that such constitutional wrongs may not be brought to federal court *after* compensation has been denied by the state judiciary. *Id.*, 125 S. Ct. at 2501-02. The only exception to this complete bar to access to justice —which for California property owners means access to the federal courts—is via direct review by this Court. *Id.* at 2499.

Understandably, the City is not disturbed at the prospect of the victims of its unconstitutional enactments having no federal forum in which to vindicate their federal constitutional rights. *See* Opp. at 11 ("[A] plaintiff claiming a regulatory taking has no special right to have federal takings claims decided in any federal court."). Coupled with the California doctrine established by the decision below, this would mean that Hillsboro and similarly situated plaintiffs would have no

remedy for the violation of their constitutional rights in *any* court, ever.

Because Hillsboro believes that the United States Constitution was intended to protect the rights of *all* citizens—regardless of the stigma of property ownership—and because there can be no protection of rights without a remedy for their violation, Hillsboro now respectfully petitions this Court to exercise direct review over the regulatory takings claim at issue in this case.

IV

THE CALIFORNIA COURTS' FLAUNTING OF *FIRST ENGLISH* IS A TROUBLING AND IMPORTANT FEDERAL QUESTION THAT WILL KEEP RETURNING TO THIS COURT UNTIL IT IS RESOLVED

At what point will this Court recognize and become concerned that its mandates are being ignored, and American citizens are being denied the protections of the Constitution, in the state courts of California? The City avers that the "California courts have competently adjudicated Hillsboro's federal claims in accordance with this Court's takings jurisprudence." Opp. at 11. But in fact, what the California courts have done is to establish that no remedy of any kind is available in that state for Fifth Amendment takings of the sort at issue in this case.

In the nineteen years that have passed since *First English*, the federal courts have engaged in astonishing evasions to avoid confronting the fact that California—the state with the most intense and intrusive regulations in the nation—has never once encountered a regulatory takings claimant entitled to just compensation under the Fifth Amendment. The mandate of *First English* has become no more than a hollow mockery, the sole effect of which is to ensure that California takings victims

cannot seek to enforce their constitutional rights in federal court.

The decision below is exceptional only in that it moves California's "no compensation" takings doctrine one step further, holding that *no remedy of any kind* is available in that state for the class of Fifth Amendment takings involved in this case—not just compensation, not equitable relief, not even an adjustment in prospective rents.

Until this Court grants certiorari for the purpose of instructing the California courts to comply with *First English*, or relaxes *Williamson County's* ban on access to federal courts, this situation will only grow worse. The time for this Court to deal with this disturbing and critical constitutional issue has come.

CONCLUSION

For all the reasons stated above and in Hillsboro's Petition for Certiorari, the Petition should be GRANTED.

DATED: November, 2006.

Respectfully submitted,

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